CIVIL RIGHTS IN THE WORK FORCE

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BEFORE THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

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CIVIL RIGHTS IN THE WORK FORCE

MONDAY, JULY 30, 1990

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m., in room 2359-A, Rayburn House Office Building, Hon. John J. LaFalce (chairman of the committee), presiding.

Chairman LAFALCE. The Small Business Committee will come to order.

First of all, let me publicly say how sorry I am that we have to be having the hearing this morning. When the Judiciary Committee voted the civil rights bill out, it seemed to me imperative that the Small Business Committee have a hearing on this general issue, as we have had hearings on virtually every controversial issue impacting the small business community.

I was advised that since the civil rights bill would not come up until September that I, therefore, could have a hearing on either Wednesday or Friday of this week, and we attempted to do so. I instructed my staff, at that time, to try to get Attorney General Thornburgh, if possible, for Wednesday or Friday, and also, to have a panel of an equal number of witnesses on competing sides.

For example, I said, let us attempt to see if we can get Professor Charles Fried, former Solicitor General, and Bill Coleman. Let us attempt to get somebody like a Bruce Fein and an Eleanor Holmes Norton. But I said we will not have a hearing unless we can have an equal number on both sides, so that we can get differing perspectives on this issue.

Then I discovered—I think it was Thursday afternoon, I am not sure exactly what time—that the House leadership was scheduling the bill for Wednesday morning of this week, and I was a bit outraged at this. But after talking with the leadership, I discovered that they still intended to schedule it for Wednesday morning.

Therefore, I said, if our hearing was to have any value, that we would have to move it up to Monday morning. I could not do it tomorrow, because I have a hearing tomorrow morning and a hearing tomorrow afternoon that I am chairing.

We could not get the Attorney General. We are fortunate enough to get the Assistant Attorney General, and that is after he canceled a speech that he was scheduled to give at this very hour in Mobile, Alabama, before the National Governors Conference.

My staff advised me that we had had Bill Coleman lined up for Wednesday, but that he could not make it for today—that was unfortunate—and that we were trying to get Eleanor Holmes Norton.

I told them then that if we cannot have two and two, it will have to be one and one, and that I will not have a hearing that is not balanced. They had arranged for Mr. Fried, but they could not get anyone else for Monday. I said then it will just be one and one.

Unfortunately, and this infuriates me, the staff put out a memo, which I did not see until about 15 minutes or so ago, that said that we were going to have somebody from the Justice Department and Professor Fried. That memo would never have gone out had I seen it. My staff is publicly excoriated for putting out such a memo right now when I had explicitly told them that we will not have a hearing unless there are an equal number of witnesses on both sides.

At the very least, they should have put down that we were negotiating in an attempt to get Mr. Coleman and Ms. Norton here. We did get Ms. Norton to agree to come. That is when I said fine, we will have Fried and Norton after the administration.

Approximately 10 minutes or so ago, we received a phone call from Ms. Norton, and she is sick and cannot make it this morning, which leaves me in the original dilemma of what to do. Certainly, we are going to have Mr. Dunne. I would have preferred to have had Mr. Fried at some other time. He tells me that he cannot make it at any other time.

I would prefer it if the bill were going to be up in September as it was originally scheduled. It seems to me as if it is being ramrodded through, and that is unfortunate.

It is my desire that as soon as Mr. Fried is here to hear from him. But if there are some vociferous objections, I would not want to have the issue of fairness of the chairman even a little bit in doubt, and it annoys me that it might even be a little bit in doubt. We will have Mr. Dunne shortly.

Mr. SKELTON. Mr. Chairman, after hearing you, there is no question of your intent to be fair. There is just none.

Mr. RHODES. Mr. Chairman.

Chairman LAFALCE. Yes.

Mr. RHODES. I agree.

Chairman LAFALCE. Is there anyone else?

Mr. SKELTON. Mr. Chairman, you can just do so many things, and you have done them all, and you have done more than all. I would not worry for a second about anyone saying that you are unfair.

Chairman LAFALCE. All right. Then we will proceed. If the leadership yanks the bill and pushes it over to September, we will try to have another hearing on this with a balanced number.

Chairman LAFALCE. Our first witness will be the spokesman for the administration. I am delighted that we do have the Assistant Attorney General, Mr. John Dunne. Please take a seat.

John Dunne and I go way back. We served together in the New York State Senate. I came into the Senate in January 1971, and John was there at the time.

We had many experiences together, primarily I think because John was what I considered to be a moderate Republican, and I was what I considered to be a moderate Democrat. So, neither of us toed the party line as much as the party would have liked, and both of us, therefore, were at odds with our party on different occasions. We were there in the middle, centrists on so many issues.

We also had another experience which was fairly unique. We were both in Attica in September 1971, John for the entire duration as a negotiator, and I as a freshman Senator. We got there within about an hour after all of the shooting started. I know of his tremendous desire for prison reform, civil rights, et cetera.

John, we are delighted to have you with us today. Here is what I am concerned about. I am concerned about getting a good civil rights bill passed. Some individuals might want an issue going into the November elections. I do not want an issue, I want a law. I think that we need a law, because I think that there are some Supreme Court decisions that have been decided that have been decided wrongly or in a way that does not accord with past congressional intent or present congressional intent.

By the same token, I have seen instances—the family leave bill was one—where proponents went too far. I think that they could have passed a good family leave bill over the veto of the President, but they came in with an excessive reach. They came in with provisions that no industrialized nation on the face of this world has right now, and it caused me, unfortunately, to oppose it.

The situation is a little bit different now. President Bush does not philosophically want to veto this bill. He wants very much to sign it. But there is the middle ground; who is being reasonable and who is being unreasonable?

I came into this picture pretty late. I came in only after it looked as if the House was going to be taking up the bill quickly, and I see areas where I agree with the Kennedy and Hawkins bill, and I see areas where I agree with the Bush administration, and I see areas where I disagree with both. What I am searching for is the common ground.

Senator Kassebaum introduced a bill that I thought, in most respects, came up with a common ground but not necessarily in all respects, so I am still searching. I do not think that the issue is who is for or against civil rights. Some individuals might attempt to make that the issue. They are the demagogues of this world.

The issue is what is the fairest way to strike an appropriate balance between the rights of plaintiffs and defendants, and to advance the cause of civil rights. Who should bear the burden of proof on what issues? What objective and subjective hiring criteria are reasonable without opening a flood gate for discriminatory practices that truly take place?

When you do have egregious situations, what type of remedies should be available under traditional employment law, or what type of remedies should be available under the Civil Rights Act? These are the questions that I am groping with right now. I would like you to share your thoughts with us. That is my opening statement.

[Mr. LaFalce's opening statement may be found in the appendix.]

Chairman LAFALCE. Is there any other member of the panel who wishes to make an opening statement?

Mr. TORRES. Mr. Chairman.

Chairman LAFALCE. Yes, Mr. Torres.

Mr. TORRES. Thank you, Mr. Chairman.

Mr. Chairman, for the record I, too, support the Civil Rights Act of 1990. I do not believe that this act has anything to do with

quotas or excessive legal fees for small businesses that they may encounter if they are sued for discrimination.

Simply, the Civil Rights Act of 1990 will restore and strengthen civil rights laws that ban discrimination in the work place.

This legislation makes title VII of the Civil Rights Act of 1964 much stronger by ensuring that every American enjoys full and adequate protection against employment discrimination. Mr. Chairman, I yield back the balance of my time.

Chairman LAFALCE. Thank you. Without objection, the ranking minority member, Mr. McDade, would like to put in an opening statement. So, I ask unanimous consent that that be done. Hearing no objection, so ordered.

[Mr. McDade's opening statement may be found in the appendix.]

Chairman LAFALCE. I make the same unanimous consent request for Mr. Conte. Hearing no objection, so ordered.

[Mr. Conte's opening statement may be found in the appendix.]

Chairman LAFALCE. Mr. Dunne.

TESTIMONY OF JOHN DUNNE, ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS, U.S. DEPARTMENT OF JUSTICE

Mr. DUNNE. Thank you, Mr. Chairman, and thank you for your very warm welcome and your reminiscing about the times that we shared, I like to think productively, as members of the same legislative body. I am delighted that you are sitting where you are today providing an even broader group of beneficiaries with your dedication.

I smiled when you made reference to the fact that we had similar approaches to many of the problems when we worked together. I guess the only difference was that since you and I were on opposite sides of the aisle that there came a time when we had more votes than you did, and I think that you have some sense of how important that is. I am delighted that you are in your position today.

Mr. Chairman and members of the committee, it is truly a pleasure to appear before you today to discuss the Kennedy-Hawkins bill in its current formulation, and, in particular, its meaning for small business. The administration remains thoroughly committed to the elimination of barriers to equal employment opportunity grounded in race, color, religion, sex, and national origin, and, by reason of the President's action last Thursday, on the basis of handicap.

For that reason, the President supports enactment of legislation to improve our current antidiscrimination laws. We have also expressed our view, however, that the bill before you, as it passed the Senate and was reported out of the House Committee on the Judiciary, will lead to quotas, is anticompetitive, and is unfair in other respects as well.

The harmful effects of this bill would fall especially heavily on small business, which provides the overwhelming majority of our Nation's jobs and, especially, its new jobs.

The President has stated that any new civil rights bill should adhere to four fundamental principles, none of which is satisfied by the Kennedy-Hawkins bill.

First, the civil rights bill should not put pressure on employers to adopt quotas. Second, any civil rights bill should be consistent with fundamental notions of fairness in our legal system. For instance, every individual whose constitutional or civil rights have been violated should have a meaningful opportunity to assert those rights in court. Third, legislation should contain a just remedy for workplace harassment without producing a bonanza for lawyers. Finally, employees of the Congress should be given meaningful protection against discrimination.

With regard to the first principle, nothing could be more destructive of productivity and competitive success for America's small businesses than quotas. By definition, quotas force employers to put aside consideration of who can do the best job in favor of hiring on the basis of race, sex, or national origin, qualities that are or should be irrelevant.

As this committee is well aware, small businesses can ill afford pressure to hire less than the most qualified individuals if they are to remain competitive in today's economy. Everyone recognizes that quotas are unfair. We should bear in mind that they are anti-competitive as well.

Unfortunately, Kennedy-Hawkins so stacks the decks against employers that they will be forced to adopt surreptitious quotas.

The bill would redefine the disparate impact theory of a title VII violation in several important respects. First, an employee would be able to launch a disparate impact challenge by alleging that the employer hired a lower percentage of minority workers than existed in the relevant labor pool, and by claiming that this disparity resulted from a group of hiring practices used by the employer.

In many cases, the employee would not have to identify which practice was alleged to have caused the disparity. Thus, a violation of title VII under the bill could be established simply by showing a bottom line disparity, and that the group of practices that constituted the employer's hiring procedure resulted in the disparity.

It would fall to the employer to sort through the group of challenged practices and to prove to the court either that they did not contribute to the disparity or that they were required by business necessity.

Mr. SKELTON. May I interrupt at this point, Mr. Chairman?

Chairman LAFALCE. Yes.

Mr. SKELTON. Mr. Dunne, in essence, is this a shift of the burden of proof?

Mr. DUNNE. That is correct, clearly, and I emphasize that under Kennedy-Hawkins that the employer would bear the burden of proof. Not only would the bill make it unduly easy for plaintiffs to bring unfounded lawsuits, but it would make it too difficult for employers to defend themselves against such suits. The bill would redefine business necessity to require that the employer prove either that the selection practices bore a "significant relationship to successful performance of the job" or that nonselection practices bore "a significant relationship to a significant business objective of the employer."

This definition, especially in conjunction with its evidentiary restrictions, places an intolerable burden on the employer. Indeed, the bill, while purporting to codify the holding in Griggs *v.* Duke

Power Co., studiously refuses to use the language from that case—interestingly, language which even the dissenting Justice Stevens in Wards Cove quoted with approval—in which the Court stated that an employment practice could be justified if it bore a "manifest relationship to the employment in question."

Of course, the bill makes no attempt to adopt the Supreme Court's decisions after Griggs, up to and through Wards Cove, which further explained the business necessity standard; quite to the contrary.

We believe that it will be so difficult for employers to carry their burdens pursuant to section 4 of the bill that they will be coerced to hire, not by merit, but by the numbers. Only by employing surreptitious quotas and ensuring that their bottom line numbers reflect the percentages of minorities in the labor pool will employers be able to avoid litigation. A pressure to avoid legal challenges will be further increased by the new attorney fee provisions in Kennedy-Hawkins.

The second requirement for the civil rights bill is that it be fair. For example, employers should only be held responsible when their actions cause discrimination. The Price-Waterhouse provision in Kennedy-Hawkins appears to be inconsistent with this. Perhaps even more fundamentally, any bill should afford every individual, who believes that his or her civil rights have been violated, a meaningful opportunity to assert those rights in court.

Section 6 of Kennedy-Hawkins runs afoul of this principle, for it would reverse Martin *v.* Wilks, which held that people not a party to a lawsuit could not have their civil and constitutional rights foreclosed by it without their own day in court. The bill would explicitly bar such claims "under the U.S. Constitution or Federal civil rights laws" in a variety of circumstances. This is difficult to understand for those who are advocating this measure as a civil rights law.

We oppose this provision because it will encourage litigants to disregard the rights of innocent third parties in formulating title VII decrees, insulate unlawful quota decrees from challenge, and, quite literally, slam the courthouse door on those who are vindicating their fundamental civil rights. Indeed, the restrictions on the rights of innocent third parties to file suit violate the due process clause. In contrast, we believe that by encouraging parties to join all affected individuals in settlements, Wilks has a salutary effect. It enables courts to consider the full range of interests affected by the decree and ensure that the rights of third parties are not bargained away.

We also oppose the Wilks provision for the further reason that it will shield from challenge, decisions that either put in place or operate to create quotas. This is because, as a practical matter, the only decrees that will be effectively challenged will be those that are unlawful, namely quota decrees. There is no reason to protect such decrees.

Furthermore, to the extent that the intent of section 6 is to prevent repeated challenges to lawful employment decrees, it is not needed. A variety of doctrines, including law of the case, res judicata and stare decisis, already exist to ensure that nonmeritorious challenges either will not be brought or can be dealt with summar-

ily at little cost to the parties. The threat of an award of attorney's fees against the party who brings a frivolous suit is a further deterrent to such challenges, and that exists in other rules of the court.

Additionally, section 6 is inconsistent with the amendment to alter the statute of limitations in response to Lorance *v.* AT&T Technologies. Both the Wilks decision and the Lorance amendment, which we support, ensure that aggrieved individuals have an opportunity to litigate their claims.

Third, the civil rights bill should contain a meaningful deterrent to workplace harassment. But it must do so in a manner that is reasonable and does not produce a bonanza for lawyers. The small business community already finds itself besieged by lawyers, and we should do nothing to aggravate this problem.

Section 8 of Kennedy-Hawkins authorizes unlimited compensatory and punitive damages under title VII. Under this proposal, both issues of liability and the amount of damage awards would have to be determined by juries. This provision would effectively dismantle the way title VII has worked. The scheme of relief authorized in title VII reflects a careful balancing of employees' rights and the need to preserve legitimate management prerogatives.

It is designed to focus parties on speedy resolution of complaints that will allow victims of discrimination to assume their rightful places in the work force, and I submit that title VII has worked well.

We fear that the broad damage remedy of section 8 will encourage contingency fee lawyers to pursue claims in court in the hope of achieving occasional jackpot victories. Plaintiffs' lawyers would inevitably include claims for pain and suffering as a matter of course. Placing these issues before a jury without limits, as well as the complex and often emotional issues of liability that characterize title VII cases, will turn title VII litigation into a time-consuming, expensive, and high-risk venture for plaintiffs and defendants, principally to the benefit of lawyers. It will be small businesses who will be especially hurt by such litigation as well as the threat of such litigation.

In fact, if you look at this bill, section 9 has a whole section devoted entirely to attorney's fees. It would require small businesses to pay a plaintiff's lawyer even after the latter rejected a reasonable settlement offer that was better than what his client finally received. It would prohibit settlements unless the plaintiff's lawyer received a guaranteed fee, and where a current decree is challenged by a third party, the businessman pays his original opponent's fee if he wins and his opponent's fee if he loses. Heads you win, tails I lose.

The fourth element of a sound civil rights bill is that it is applied to Congress, just as it applies to the executive branch and every other legislature in this country, as well as the private employers. Congress appropriately made title VII applicable to the executive branch of government, and it should now do the same with regard to itself. It should authorize a private right of action for congressional employees who have suffered discrimination.

Mr. Chairman, last week President Bush signed a major civil rights bill—some citing it as among the most significant civil rights legislation in the history of our country—the Americans with Dis-

abilities Act. The President would like to sign another civil rights bill, but he will not sign a quota bill. Any bill should adhere to the principles outlined by the President in his Rose Garden remarks.

I would be pleased to answer any questions that you may have.

Chairman LAFALCE. Thank you very much, Mr. Dunne.

Mr. DUNNE. May I point out for the record, Mr. Chairman, that I am joined here by the Deputy Assistant Attorney General for Civil Rights, Roger Clegg, and also, Mr. Nicholas Wise, who is from the Office for Legislative Affairs at the Justice Department. I may have to call upon them.

Chairman LAFALCE. If Mr. Clegg or Mr. Wise wishes to come to the table, so that they might participate also in the answering of questions, we would be more than happy to have them. So, why do you not both come up.

As I understand current law, current law is that the respondent, as the employer, must prove that an employment practice with a disparate impact is required by business necessity. Is that correct?

Mr. DUNNE. Not under Wards Cove, not under the Wards Cove decision. He has a burden of coming forward and raising that as an issue, but under the Wards Cove decision, the employee petitioner/plaintiff in a title VII proceeding bears the burden of persuasion and proving that it is not required by business necessity. That is the state of the law as it exists today.

Chairman LAFALCE. You are willing to reverse Wards Cove in that respect; is that correct?

Mr. DUNNE. No. To make it perfectly clear, you are discussing the three aspects of Wards Cove. First, identifying the particular practice which causes the claimed injury; second, clearly identifying and defining just what business necessity is; and then identifying who has the various burdens with regard to the proof of that issue. All three of those elements, it is our contention, have to be discussed as a whole, and the administration's position, at this point, is not to concede a willingness to undertake any change in the burden, but that we would be following, basically, the position that we have taken in the brief filed in the Wards Cove case, which is support of the existing law.

However, obviously, for those three aspects—if they are discussed in the sense of trying to achieve the standards of fairness, which were outlined by the President in his Rose Garden speech—we recognize that there could be an accommodation for some shifting, but not until such time as there is a clear definition of what was the Griggs and its progeny's development of the concept of business necessity.

Chairman LAFALCE. John, try to clarify it for me. What did Griggs and its progeny hold with respect to the plaintiff's establishment of prima facie case? What did it hold then with respect to a switch to the defendant of either the burden of proof or burden of persuasion? What has Wards Cove done, or any of these other Supreme Court decisions, to affect this?

Mr. DUNNE. Most importantly, Griggs said for the first time that intentional—you did not have to prove intentional discrimination in order to obtain relief under title VII. Thus, the concept of disparate impact——

Chairman LAFALCE. Did it say you did not have to prove intention or that——

Mr. DUNNE. That is right.

Chairman LAFALCE [continuing]. Disparate impact would permit the inference of intentional discrimination?

Mr. DUNNE. No, no; it is just standing alone. You did not have to infer discrimination. It simply said that even if you had the cleanest and highest of intentions, never intending discrimination, if it did, in fact, have a disparate effect or impact, that would be the basis for seeking relief.

Chairman LAFALCE. If what had a disparate——

Mr. DUNNE. Your hiring practices.

Chairman LAFALCE. In total as a group or individually?

Mr. DUNNE. Either way, but in either circumstance, whether you allege a single practice or a group of practices, Griggs indicated that you had to identify those practices and give them a causal, show a causal nexus to the disparate impact.

Chairman LAFALCE. Identify the nexus. You identify the practices. Show a causal relationship.

Mr. DUNNE. Yes.

Chairman LAFALCE. Then also show a disparate impact?

Mr. DUNNE. That is correct.

Chairman LAFALCE. The plaintiff had the burden of proof with respect to all those points; is that correct?

Mr. DUNNE. Correct.

Now, where Griggs was not clear was the burden and the nature of the burden with regard to proving the issue of business necessity.

In the 19 years after Griggs, there were a series of circuit court decisions, some saying that burden was on the defendant, others saying that it remained with the plaintiff throughout, and it was in Wards Cove that Justice White——

Chairman LAFALCE. So, the affirmative—there was an affirmative defense, business necessity; is that right?

Mr. DUNNE. Which simply had to be pleaded by the defendant and some evidence introduced to indicate that there was a basis for that, some evidence, burden of going forward. However, the burden of persuasion, the burden of proof lay with the plaintiff.

Chairman LAFALCE. What, that there was no business necessity?

Mr. DUNNE. That is correct.

Chairman LAFALCE. What did Wards Cove do to change this?

Mr. DUNNE. Well, there was ambiguity, if you will, as to who had the total burden of proof with regard to business necessity, and Wards Cove clarified that.

Chairman LAFALCE. There was ambiguity under the progeny of Griggs?

Mr. DUNNE. That is right. Really, what had happened, Mr. Chairman, was this. The court did not clarify in Griggs who had that burden and what the nature of that burden was. It was not totally clear. A number of circuit courts and district courts said, well, the court did not say, but we believe the Supreme Court meant. In that aura of uncertainty, Wards Cove said——

Chairman LAFALCE. But were there not Supreme Court decisions that are considered the progeny of Griggs rather than just circuit court decisions?

Mr. DUNNE. Well, there was Watson and others which really were not definitive. They were not totally clear. In fairness to litigants, obviously, with the——

Chairman LAFALCE. So then Wards Cove——

Mr. DUNNE. Wards Cove clarified it.

Chairman LAFALCE. All right, for good or for ill. Again, how did Wards Cove clarify it?

Mr. DUNNE. It said very clearly that the burden of proof with regard to business necessity remained with the plaintiff, but that the defendant has the burden of coming forward and producing some evidence, putting business necessity into issue, but did not have to prove business necessity as a defense.

Chairman LAFALCE. OK. Now, one administration position could be that the burden of proof must clearly be on the plaintiff, even with regard to the affirmative defense. I would find that unreasonable.

Mr. DUNNE. Well, it is the position we took in our brief before the Supreme Court in Wards Cove, and it is the position that the court adhered to, so that we cannot just walk away from it.

Chairman LAFALCE. I am not suggesting that you walk away from it. I am trying to find a moderate ground in between.

What is the approach that the Kennedy-Hawkins bill takes?

Mr. DUNNE. The Kennedy-Hawkins bill clearly places on the defendant employer the responsibility or the burden of not only pleading, but also proving that each and every one of his practices was required by business necessity. That is what the Kennedy-Hawkins bill does. Even in the absence of the plaintiff having identified which specific practices contributed to the disparate impact.

Chairman LAFALCE. OK, but suppose we came up with a bill which requires the plaintiff to allege and prove the specific practices that are not resultant, but that caused a disparate impact. Then, would it not be reasonable to permit a shifting of the burden of proof to the employer for the assertion of the affirmative defense of business necessity?

Mr. DUNNE. If there were a definition of business necessity which tracked the language of Griggs—which the proponents of Kennedy-Hawkins from the outset have claimed all they want to do is go back to Griggs—and if you had a definition which was supported by a body of case law over the past 19 years, then an employer would have some sense of what he has to face. Then there would be a reasonable basis, Mr. Chairman, for talking about statutorily shifting that burden.

Chairman LAFALCE. OK.

Mr. DUNNE. But on the present state of the bill where you have that——

Chairman LAFALCE. OK, but the bill that I introduced Thursday requires the plaintiff to prove the individual practices or group of practices which cause the disparate impact, and, in such circumstances, then assuming an appropriate definition of business necessity, I think that it is appropriate at that point to switch the burden of proof for the affirmative defense to the respondent.

Mr. DUNNE. Most respectfully, Mr. Chairman, not having seen your bill, but what you have outlined suggests to me something along the line of the bill offered by Senator Kassebaum a couple of weeks ago.

Chairman LAFALCE. Yes; very, very similar; almost identical.

Mr. DUNNE. A bill in which Mr. Sununu, I am told, made the comment it looks like the sort of thing that we ought to seriously consider. I would have to say that what you have outlined to me is a matter that I had better look very closely at, and I think the present senior advisors would be interested in reviewing.

Chairman LAFALCE. All right. Now, let us focus in on two things now. What the plaintiff must prove to establish the prima facie case, because—well, how does the Kennedy-Hawkins bill, the bill reported out of the House Judiciary Committee, differ from Griggs and its progeny in that respect, if at all? Or does it simply return to Griggs and its progeny?

Mr. DUNNE. No; It is similar——

Chairman LAFALCE. May I say, Mr. Rhodes, obviously I am not using the 5-minute rule. Feel free to comment at any time.

Mr. DUNNE. On the salutary side, the Kennedy-Hawkins bill reaffirms, as did Wards Cove, the Griggs recognition that an aggrieved party can obtain relief simply by showing a disparate impact rather than an intentional disparate treatment.

But where the Kennedy-Hawkins bill departs from Griggs is that, one, it does no longer require the identification of each and every employment practice which is alleged to have brought about the disparate impact. Second, it provides a standard or definition of business necessity so different from Griggs and so difficult in application that it places, by its terms, a burden which is wholly, I think, almost impossible for an employer to meet. So, that is where the rub is.

Chairman LAFALCE. Well, the business necessity, though, is part of the affirmative defense.

Mr. DUNNE. Yes; but, excuse me, you asked me where Griggs differed from the Kennedy-Hawkins bill.

Chairman LAFALCE. With respect to the prima facie case.

Mr. DUNNE. Well, fundamentally it is the failure to require a plaintiff to identify each and every practice which is claimed brought about the disparate impact. So, what you have simply under the terms of the Kennedy-Hawkins bill, the opportunity for a plaintiff to simply say, here is a whole package of the employer's practices. I do not know which one caused it, but, you Mr. Employer, come forward and bear the burden of justifying each and every one of those practices, however numerous they may be, justify them in terms of being necessary for business.

Chairman LAFALCE. I also note this. That in all other case law that I am aware of, correct me if I am wrong, plaintiff must show causality. Now, causation can be defined in different ways, I suppose, or proven in different ways. But plaintiff, as I understand it, under current law, under Griggs and its progeny, must show a causal relationship between an individual group of practices and the disparate impact.

The House Judiciary Committee bill, I think, differs in a number of respects. It says that the plaintiff need show that a group of em-

ployment practices, without specifying which ones, results in a disparate impact. Now, I think we understand the difference between an individual practice and a group of practices in showing specificity. But what is the difference, because it causes a disparate impact and results in a disparate impact? Is it a difference with a major difference, or is it a difference without a difference?

Mr. DUNNE. Well, I think you had best speak to the proponents about that, Mr. President—Mr. Chairman.

Chairman LAFALCE. That is OK, John.

[Laughter.]

Mr. DUNNE. One of my colleagues did that in a hearing before Senator Kennedy. I think we were shocked at the prospect.

Mr. Chairman, the very point that you raise was raised by me during the course of extended negotiations about a month ago with representatives of the proponents as well as the supporting groups. They said, well, there is really no difference, and we said, well, all right, let us substitute results, and put that out, and put in caused, and they refused to do it. So, I think you have to look to them to find that explanation, because, obviously, their unwillingness to put in the traditional words would imply that there is a difference, and I really think that, once again, you are opening——

Chairman LAFALCE. Well, according to my law school days, and this is going back now to the early 1960's, when we attempted to have a causal standard, and we always had a causal standard in everything under the sun, we used the word cause, and I am wondering why we are now using the word resulting rather than cause, if it is some lower standard that would have to be proven, not just——

Mr. DUNNE. It suggests that there could be some intervening factors, because you are talking about cause as a direct relationship between those motivating items and the actual result or effect—whereas results could bring in other factors in a larger net—and that, which you point out, is one of the aspects which troubles us.

Chairman LAFALCE. All right, now, what about this business necessity? Now, what are the problems that the administration has with Kennedy-Hawkins and the House Judiciary Committee bill? What do they do that you think is inappropriate?

Mr. DUNNE. The representation made by the advocates of the legislation right from the outset was that they sought to restore Griggs. Our response to that is, if that is your intent, why not use the language from Griggs to define business necessity.

Chairman LAFALCE. Well, it is my understanding that they do use some language from Griggs, although it is not the language that the administration says should be used from Griggs, and it is not the language that the cases have used in applying Griggs. It was language that was used in the formulation of the issue rather than in the holding and rather than in all the subsequent cases expounding upon Griggs, Griggs and its progeny.

Is that a fair characterization of the dispute between the different sides?

Mr. DUNNE. It may be a fair characterization, but let me get to the language rather than characterize it.

Chairman LAFALCE. Fine. Good, good.

Mr. DUNNE. I am not sure I have a reprint of it. It is page three, line one, where there are two definitions for business necessity. One is when you are considering it, whether it is job related, and when it is not employment related. They use the phrase "significant relationship to successful performance of the job." Griggs says "demonstrable relationship to successful performance of the job."

Why they have chosen to use "significant," which is a word different than demonstrable, and a word which has been the basis for 19 years of interpretation, I do not know.

The second definition of "significant relationship to a significant business objective of the employer" is not language which is used in Griggs, and we have suggested that they use the language which Justice Stevens, in his dissent in Wards Cove, cited with approval; namely, a manifest relationship to the employment in question.

Chairman LAFALCE. Which language is not only in Wards Cove's dissent, but was in Griggs itself.

Mr. DUNNE. Originally, right, and Judge Stevens was quoting that.

Chairman LAFALCE. Its progeny, I understand, that is the language that has been cited most frequently. I am not sure about that. That is what I have been advised.

Mr. DUNNE. That is a lot of lawyer talk. What we are concerned about, Mr. Chairman, is that if you do not want to go back to Griggs, say so. Then we will try to figure out what you are trying to say here. But if you want to go back to Griggs, which has provided a reasonable basis for hiring standards, then why not use that language? That is our problem, and we believe, as we have said repeatedly, that the Kennedy-Hawkins bill goes beyond Griggs, not just in the definition of business necessity, but the other points to which you have already directed your attention.

Chairman LAFALCE. Any other further points?

Mr. DUNNE. The other point is this. That while they do bow to considerations of business necessity beyond simply the relationship between the employer and the employee, those items which are embraced within the employment practices, they say there at line 22 on page 2, such as hiring, assignment, transfer, retention—these are considerations which could be involved in business-related concerns such as, say, a multioperational business. It might say, well, we have to close down the fabricating plant here down in your district on Long Island, and transfer these folks up to Lockport. That is a business decision based upon how the business can most effectively operate.

Well, that transfer decision cannot be made simply on the basis of business considerations, legitimate business practices, but it has to be made in the context of employment considerations.

If a person is properly performing his job on Long Island, you cannot use a business decision to transfer that whole operation to another location, because it falls within an employment practice and not within a nonemployment practice.

So that the way that this bill has been crafted is, they said they bow or nod to considering genuine business needs, but they really emasculate it by putting under employment considerations virtually every decision, even nonemployment decisions which an employer would be called upon to make.

Chairman LAFALCE. Now, I have not discussed this issue with you, Mr. Dunne, other than to make an arrangement to come to this hearing, and you and I have never met before. What is your name?

Mr. CLEGG. Roger Clegg.

Mr. DUNNE. Roger.

Chairman LAFALCE. Mr. Clegg, your deputy.

Mr. Wise, you are in congressional relations, and you and I did talk. I do not recall you mentioning the Wilks case to me. Maybe you did in your conversations. Do you recall either?

Mr. Dunne, you made considerable moment of the Wilks decision, so would you flesh out for me the issue surrounding Wilks and the proposed bills that passed the Senate, moving through the House right now, and how they impact on that issue?

Mr. DUNNE. Martin *v.* Wilks is the so-called white fire fighters case in Birmingham, Alabama. The Birmingham officials, the mayor and the governing body, entered into a consent decree providing for certain promotion quotas for black fire fighters in that city.

Subsequent thereto, some members of the community, white fire fighters who were denied the opportunity for promotion within the department, brought an action seeking to challenge that consent decree, claiming that it violated their individual civil rights and violated their constitutional rights.

The Supreme Court said that we find that you were not parties to the proceedings which led to the entry of the consent degree; that your rights were potentially impaired by the entry of that degree; that those rights were rights guaranteed to you under the Constitution or the various civil rights statutes of this Nation; and, therefore, you have a right to come into this court and challenge that entry of that decree on that limited basis—that it violated your constitutional and/or civil rights. That is what the court decided in the sense of fair play.

It is very interesting, Mr. Chairman, that the response in the Kennedy-Hawkins bill to Martin *v.* Wilks says that there is an exception to a basic rule of fair play. That where you claim to have had your civil rights violated, you cannot reopen it, not only if you have not had actual notice, but where there has been someone else in the courtroom who may have had an identity of interest of yours, regardless of the fact that you knew about it, who might have raised the same issue. It just runs against the basic idea of fairness in our courts.

Frankly, I do not know how a civil rights bill can carve out such an exception against those who are asserting their civil rights.

Chairman LAFALCE. What is the language in the bill again? You say its effect would be, even though I had no notice if somebody else had been representing an interest, which is an interest I am attempting, that it would in a sense be res judicata, or I would be estopped from now asserting that interest.

Mr. DUNNE. All right.

Chairman LAFALCE. Is that——

Mr. DUNNE. Yes; the language of the bill is at page 9, line 1. You are barred from raising this if the court finds that you are a person with respect to whom the requirements of subparagraph (a) are sat-

isfied. That is, if you have actual notice and an opportunity to come in and present your interests.

If the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of the judgment, or if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested party. What we have here is an acknowledgement that, one, the person has not had notice of it, has not had the opportunity to come in, but maybe somebody else with an interest similar to yours came in and presented your argument.

How well? I do not know. I would hate to think that if I had a civil right or a right guaranteed by the Constitution, some nondelegated surrogate could come in and assert my position.

And why is it that this barring of the courthouse door——

Chairman LAFALCE. You just want to leave that alone.

Mr. DUNNE. We believe Martin *v.* Wilks makes eminent sense.

Chairman LAFALCE. OK.

Mr. DUNNE. Eminent fairness.

Mr. RHODES. Mr. Chairman.

Chairman LAFALCE. Yes.

Mr. RHODES. May I make a comment?

Chairman LAFALCE. You may.

Mr. RHODES. Are you saying that this bill says that if there was a party to the action who may have asserted my rights, not did but may have, that I am, therefore, estopped essentially from challenging the decree?

Mr. DUNNE. The language, if I may. It is best that I respond with the language from the bill, Mr. Rhodes. If the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order, so that if someone had a similar position that you and I might have shared.

Mr. RHODES. And did assert that position. Not may have, but did assert.

Mr. DUNNE. Who challenged. Yes, sir.

Mr. RHODES. All right.

Mr. DUNNE. That is the way it would read.

Mr. RHODES. But your observation was that he may have asserted it, but there is no indication as to how well he may have asserted it.

Mr. DUNNE. Exactly, and when you are talking about——

Chairman LAFALCE. But it also says, though, if the court that entered the judgment or determines that reasonable efforts were made to provide notice to interested persons.

So, if your interest was not defended by anybody with a similar interest, regardless of adequately defended or not, if there were no attempt and if you did not have notice but the court says, well, a reasonable effort was made to provide notice to interested persons, or if you become an interested person subsequent to the time that reasonable notification efforts were made, you would be barred under that language.

Mr. DUNNE. That is right, and it should be kept in mind, if I may point out, that we are only talking about challenging unlawful decrees. Unlawful because they violated your constitutional right or

your statutorily defined civil rights. That is why we find this so troublesome.

If it is a civil rights bill, why have a specific provision barring the courthouse to those asserting those rights?

Chairman LAFALCE. The Chair yields for 5 minutes to Mr. Rhodes.

Mr. RHODES. Thank you, Mr. Chairman.

Again to this point of a third party's representation. If I, and I do not have the bill language in front of me, but if I recall, what you said was if a third party did assert your claim, or if the court that entered the decrees determines that there was adequate notice. Is that correct?

Mr. DUNNE. Well, they say there were reasonable efforts made to provide notice, and it is kind of fuzzy.

Mr. RHODES. OK, but it is the court that has entered the decree that determines that there were reasonable attempts to give notice.

Mr. DUNNE. Yes.

Mr. RHODES. Is that correct? It is not a reviewing court. It is the court that entered the——

Mr. DUNNE. Yes; it is.

Mr. RHODES. Which would seem to indicate that the court would probably determine that if the court had given reasonable notice, otherwise the court would be determining that its own proceedings were suspect.

Mr. DUNNE. Yes, sir.

Mr. RHODES. Chairman LaFalce has obviously spent considerable time in this field. I have not been so fortunate, or so unfortunate. Can you define for us, so that we have it in the record of this hearing, what a disparate impact is? Just take a moment.

Mr. DUNNE. Where the composition of an employer's work force, based upon race, color, creed, gender, national origin, does not——

Mr. RHODES. Disability.

Mr. DUNNE. Thank you very much. Or disability, does not reflect the composition of the eligible work force available to fill those positions, that is a disparate impact. If there is a—I do not want to use significant—but if there is a departure or a divergence from the makeup of the employer's work force from that of the available qualified labor pool out there to fill those positions——

Mr. RHODES. Is qualified a——

Mr. DUNNE. Oh, sure. That is a central element. Oh, yes.

Mr. RHODES. Thank you.

Mr. DUNNE. In fact, the court focused on that in Wards Cove and just clarified that certainly that is clearly what you are talking about.

If there is that, that constitutes a disparate impact.

Mr. RHODES. You used during your testimony a couple of times the phrase "surreptitious quotas." It is my understanding that under existing law, as it exists now without Kennedy-Hawkins, the quotas are illegal.

Mr. DUNNE. That is correct.

Mr. RHODES. Does Kennedy-Hawkins or the House Judiciary Committee bill make quotas legal?

Mr. DUNNE. It does not. In fact, in deference to them, they want to once again tip their hat to that issue by saying that nothing in

this statute shall be construed as to require quotas. If indeed, we submit, if they wanted to outlaw quotas, they could very specifically address that. But in fairness to the sponsors, it does not require quotas. However, we believe that in the practical effect of the provisions in the Kennedy-Hawkins bill, if the employer gets in trouble because his numbers are not right, the only way he can get out of it is either face expensive, prolonged lawsuits—which could have a very damaging effect on his position in the community, the market to which he is selling his product or services, disruptive of his employment practices—or juggle the numbers so that there will not be a basis for a claim of disparate impact. That is what he is faced with.

Mr. RHODES. So, to put it another way, he is faced with avoiding an unpleasant legal situation by committing an illegality by establishing the quota system, which is illegal.

Mr. DUNNE. That is why they are surreptitious, and no one will admit that he is resorting to quotas, but, as a practical matter, they do.

Mr. RHODES. Does saying nothing in this act shall be deemed to require a quota say in another way that you establish a quota system and will look the other way?

Mr. DUNNE. I think it is a wink.

Mr. RHODES. Switching again to the burden of proof. It sounds to me that all a complainant need do is complain. All a complainant need do is file an action and say that this employer's employment practices, and I do not know which one, but that his employment practices and here they are have caused a disparate impact and created a situation which has discriminated against me, prove to me that it did not happen.

Mr. DUNNE. Well, Mr. Rhodes, in fairness to the plaintiff here, first, he must establish the disparate impact, and that can be a complex and a costly endeavor.

Mr. RHODES. But he does have to establish that there has been a disparate impact?

Mr. DUNNE. That is correct. That is an essential of his prima facie case. The other essential is, as in any civil action, he should prove causation. That is: Mr. Employer, you are doing practices one, three, seven, and eight. They are the bad practices. They are the ones that result in this disparate impact.

Mr. RHODES. I thought that under——

Mr. DUNNE. Under Kennedy-Hawkins, he does not have to.

Mr. RHODES. OK, that is what I——

Mr. DUNNE. Yes; under Kennedy-Hawkins, he does not have to.

Mr. RHODES. That is what I was talking about.

Mr. DUNNE. Yes, sir.

Mr. RHODES. Under Kennedy-Hawkins, what exactly does the complainant have to prove?

Mr. DUNNE. He has to prove the disparate impact.

Mr. RHODES. But he does not have to prove——

Mr. DUNNE. He does not have to single out what caused it, but he must prove that there is that disparity between the employer's work force and the racial, ethnic, gender makeup of the available work force that is out there from which the employees can be drawn.

Chairman LAFALCE. Mr. Poshard, I think you have a question.

Mr. POSHARD. Thank you, Mr. Chairman.

Mr. Dunne, in such a case, having a limited access to data, or records, or whatever to confirm whatever practices or deny whatever practices the employer may have used to build his work force, why should not the burden of proof lie with the employer to prove that he has not been discriminatory in the types of practices that he has used to build his work force?

I mean, how would the employee, who may have been discriminated against or who feels strongly that he has and has now proven disparate impact, how would the employee prove in a less cumbersome way that the employer has been discriminating against a certain race or sex or whatever? How would he do that less easily than the employer?

Mr. DUNNE. Simply by reason of the very liberal and very effective discovery rules which are available under the Federal Rules of Civil Procedure.

Mr. POSHARD. Well——

Mr. DUNNE. In addition to that, the requirements of EEOC that employers maintain these records, and, finally, in the event that discovery does not enable the employee to identify these causes, the position, our position is very much as expressed in Solicitor General Fried's brief in this case where he demonstrates it is not possible to identify which of the causative factors, then the burden would shift. But only in that case.

Mr. POSHARD. But it seems to me that if an employee proves that disparate impact, in fact, is the case, the employer, who has all of these data bases, and he knows how he built his work force, should be made to prove there has been no discrimination. Just lay it out on the table rather than forcing an employee, who has proven that the work force is not reflective of the amount of laborers are available in each of these categories, to provide that documentation. It seems that it would be very fair for the employer just to say, OK, here are the records; here is what we have done. Now, what is wrong with that? What is more fair than that? Than having an employee who may not have the wherewithal to afford the expensive litigation, or hiring of lawyers, or whatever it takes to prove his case. Why would it not be more fair just to say, well, at this point in time since the work force is not reflective of what is available, employer, show us why?

Mr. DUNNE. The answer to that quite simply is that sense of fairness, which has been embodied in our common law and in our various statutes, State and Federal, governing the conduct of litigation, has said that the burden shall always, always be on an aggrieved party, a plaintiff to prove two things: One, that he has been injured; and second, that the person against whom he is seeking redress caused the injury. Causation, not only effect, but the nexus of causation has been basic to the concept of fairness in our entire judicial system.

Now, there may be special circumstances to carve out an exception to any rule. However, with the liberal discovery rules where an employer is required during the preliminary stages of litigation to provide and make available for inspection by the plaintiff all of his records relating to his employment practices—that captures the

element of fairness and addresses any sense of an inability of an employee to contend with a large employer. That is all we are asking for. We are asking for the traditional sense of fairness to be applied.

Indeed, if there is a case where it becomes unfair, then we will accommodate it. But I submit to you that the laws of our country already accommodate and address a situation to provide access to records in order to enable the plaintiff in a title VII case to conduct his litigation in conformance with traditional sense of fairness.

Mr. RHODES. Will you yield to me on that point?

Mr. POSHARD. Certainly.

Mr. RHODES. It seems to me that your point is well taken in the terms of the employer presenting his defense. He will attempt to break that causation by doing exactly what you suggested that he should do. If the employee establishes during the course of his presentation of his case that there is causation between an employment practice and a disparate impact, then the employer will of necessity come forth with his own interpretation of his employment practices in order to attempt to break that chain of causation.

Mr. POSHARD. Well, with all due respect to the gentleman, and, Mr. Chairman, I do not mean to belabor this issue, but it seems to me that if an employee showed disparate impact, inherent in that process, he has shown causation.

Mr. DUNNE. Oh, no, no.

Mr. POSHARD. Well, wait a second. I have shown that something has affected the inability of the employer to build his labor force according to the present law. Something has caused me not to be able to be considered for employment, if I am disabled, or of a certain race, or I mean, there is some cause there, is there not?

Why should I have to show among all the many different practices that are available for so-called causation? I have already proven that there is disparate impact here within this labor——

Chairman LAFALCE. May I suggest to the gentleman I really think that the gentleman's argument would have great merit assuming we deemed it appropriate to adopt liability without fault, and we have done that in a good many instances with respect to product liability. We have done it under Superfund. Well, I think what the gentleman is suggesting, at least implicitly, is that we adopt liability without fault in discrimination cases.

If you are not, then I think the issue is who should prove causation, who should prove disparate impact, et cetera. I think there is a difference there.

I wonder if the gentlemen on the committee might agree that we have held the feet of Mr. Dunne over the coals long enough. We do now have not only Professor Fried to testify, but in order to substitute for Eleanor Holmes Norton who, as I said, about 10 minutes before the hearing called up sick, we have Ellen Vargyas, the attorney for the National Women's Law Center, who is extremely well versed on all the nuances of the civil rights law, the court cases, and the bills that have been proceeding through the legislative process. So, we would be able to hear from two other individuals on the various legal issues involved.

Do you think we might thank Mr. Dunne? Would that be OK, Mr. Poshard? Do you have any further questions you would like to ask of him particularly?

Mr. POSHARD. No; that is fine. Thank you, Mr. Chairman.

Chairman LAFALCE. Mr. Rhodes.

All right, Mr. Dunne, because of the fact we do wish to get to the other two, I want to thank you very, very much for your testimony. You have been helpful to us in our deliberations. Thank you.

Mr. DUNNE. Thank you. I hope we will have an opportunity to continue to work on this with you.

Chairman LAFALCE. Well, I would hope the bill would be pulled from the calendar and brought up in September, because I hate being forced into the situation where we have to rush to judgment on such extremely complex issues much, much sooner than anticipated. It has forced the hand of so many of us who do not want our hand forced, and then we bow against it, and sometimes do things we would prefer not to do, but only because we are pushed against the wall. If the bill were yanked and brought up the first or second week in September, the Members of the House could be given a bit more time to proceed reflectively on the issue. We will see.

Mr. RHODES. Mr. Chairman.

Chairman LAFALCE. Yes, Mr. Rhodes.

Mr. RHODES. Mr. Chairman, I have to apologize to you and to the other two witnesses. I have just been advised that I have a meeting at 11 o'clock with the minority leader on this very subject. I join with you in the desire to see this bill postponed until September. I would have to confess to you, I have not——

Chairman LAFALCE. We do not seek a postponement. We seek its scheduling as originally stated.

Mr. RHODES. That is correct. That is correct.

Chairman LAFALCE. We were originally told it would be brought up in September. It was not until Thursday that it was scheduled for this coming Wednesday. I do not even know if there is a committee report out from the Judiciary Committee on it yet so that we could have the benefit of reading the pros and cons. I do not believe a committee report does yet exist.

Mr. RHODES. I have not enjoyed anything more since preparing for a moot court argument almost three decades ago.

Chairman LAFALCE. OK, good.

Mr. RHODES. I am sorry to have to leave this session. Thank you.

Chairman LAFALCE. That is OK.

Mr. Dunne, thank you very, very much.

Mr. DUNNE. Thank you, Mr. Chairman.

Chairman LAFALCE. I wonder if Professor Fried and Ms. Vargyas could come to the table, please, and I wonder if staff, at the very least, could take away the name John Dunne. OK, good.

First of all, Ms. Vargyas, am I pronouncing it correctly?

Ms. VARGYAS. Yes; you are.

Chairman LAFALCE. Vargyas. Thank you.

Do either of you have prepared testimony?

Mr. FRIED. Mr. Chairman, I do have prepared testimony. But from what I have seen, the chairman is so far up to speed that I am going to spare him large parts of it and get straight to the point.

Chairman LAFALCE. All right.

Ms. VARGYAS. Sir, I found out about the hearing this morning at 7:15, so I am sure you will accept my apologies that I do not have a prepared statement.

Chairman LAFALCE. OK. Did you know at 7:15 that you were going to be coming in today?

Ms. VARGYAS. It was 7:00, and I said I was just so happy to hear it was not the baby sitter getting sick that I said, sure, I would be happy to come in.

Chairman LAFALCE. Well, I found out about 10 or 5 to 9 that Ms. Norton could not make it. Let Mr. Fried's prepared testimony be put into the record at this point. Without objection, so ordered.

[Mr. Fried's statement may be found in the appendix.]

Chairman LAFALCE. Who would prefer to go first, Ms. Vargyas, or Professor Fried?

Mr. FRIED. Well, I might be able to follow up on what Mr. Dunne said. I am sort of on his wavelength, but because I do not work for him or the administration anymore, I am a little bit off his wavelength too, and that might provide a slide into——

Chairman LAFALCE. Why do you not take up then, Professor Fried, what you consider to be the important issues in controversy. Discuss them as you will, and Ms. Vargyas, if you would then take up the important issues in controversy, discuss them as you will, refute either Mr. Dunne, if you heard him, or Professor Fried, if that is your desire, et cetera, and the Chair will feel free to question you during all of that.

Mr. Poshard, you should feel equally free.

TESTIMONY OF CHARLES FRIED, CARTER PROFESSOR OF GENERAL JURISPRUDENCE, HARVARD LAW SCHOOL

Mr. FRIED. I have no problem with the Griggs concept or the concept of a disparate impact lawsuit. I think Mr. Poshard put his finger on a problem, but, with respect, I think he got it 180 degrees wrong in this respect. That the idea that just because there is a racially unbalanced work force the employer is presumed to have done something wrong is a seriously mistaken and dangerous notion.

You could have a racially unbalanced work force for a variety of reasons, many of them entirely innocent, and the great fault of Kennedy-Hawkins is that it says to the employer either your work force is racially balanced, or you are subject to a lawsuit that you can hardly win. This is something which Hubert Humphrey, in his statements in support of the original civil rights bill said, we are not interested in producing. Just because you have a work force that is not racially balanced does not mean that anybody has done anything wrong. It raises a question. It properly raises a question, and it raises a question that should be answered, and the question then is how do you answer that question, and who must answer it? That is the point.

But the idea that wherever there is a lack of racial balance, this in and of itself suggesting that something is wrong is, I think, really a very dangerous notion, because it is a notion that is behind this quota idea. That only if everything works out to the number,

can we be comfortable that the world is working right. That is not, I think, a sound idea.

Well, the trouble with the Wards Cove provisions in Kennedy-Hawkins just is, and I will get straight to the point, that in subtle and obscure language, which is so technical I think that only experts can parse it—and which I think are really inconsistent with the vision that Hubert Humphrey put forward—it does compel or provide very strong incentives to quota hiring, because that is the only way an employer can assure himself that he is not running a rather uncertain risk of very grave liability.

The great fault of Kennedy-Hawkins is to put employers in a situation that they run litigation risks so menacing that it is by far the most rational thing to do, to just avoid them and hire a racially balanced work force in the first place.

Now, how does that work?

Chairman LAFALCE. You keep saying racially balanced work force. But it is not just racial balance.

Mr. FRIED. Gender balance, ethnic balance. I am using that as a shorthand.

Chairman LAFALCE. Yes.

Mr. FRIED. It is balanced in every respect.

Chairman LAFALCE. I mean, suppose some Poles came in and said, you do not have an adequate number of Poles. The city of Buffalo is predominantly a Polish community. Would you legally have the same right as a black to bring your case?

Mr. FRIED. Oh, I think that would create a prima facie case, and you can see how difficult that becomes, because if you try to have——

Chairman LAFALCE. So, then you must have the right number of Poles, and Italians, and women, and blacks, et cetera, et cetera?

Mr. FRIED. The outcome and the form of thinking that puts employers into——

Chairman LAFALCE. Ms. Vargyas, you were shaking your head that that is not correct.

TESTIMONY OF ELLEN VARGYAS, ATTORNEY, NATIONAL WOMEN'S LAW CENTER

Ms. VARGYAS. With all due respect, I think that we are working here from a fundamental mischaracterization of what this legislation does. Again, forgive me for being late and being on such short notice. But looking at the Judiciary Committee bill and the bill which passed the Senate, I am not sure when you say Kennedy-Hawkins if you are talking about the Education and Labor Committee bill. Let me be very clear about what this bill does.

This bill specifically does not say that as soon as you show imbalance on the basis of gender, national origin, race, what have you, you have a prima facie case. That is not what this bill says, and I am looking here from the Judiciary bill, which virtually has the same language as the Senate-passed bill, and it talks about employment practices. You have to identify employment practices or groups of practices which result in the disparate impact.

In order to address the very——

Chairman LAFALCE. But there is a great difference between result and cause, is there not?

Ms. VARGYAS. Well, you have to link them. There has to be a nexus between the--I cannot go in----

Chairman LAFALCE. A causal, a causal connection?

Ms. VARGYAS. Yes; it has to go back----

Chairman LAFALCE. Well, then, why do we not use the word "cause"?

Ms. VARGYAS. Well, sir, I mean, I do not know why the word "cause" was not used.

Chairman LAFALCE. Well, it is my understanding the Civil Rights Coalition rejects the use of the word "cause."

Ms. VARGYAS. I think that the word "resulting" more directly embodies it. "Cause" can have inferences of intent which clearly is not included.

Chairman LAFALCE. No, no, no, no. "Cause" and "intent" are totally different concepts. But "cause" is a primary concept within the history of jurisprudence, and it is difficult for me to understand the reasonableness, if you accept the reasonableness of the Civil Rights Coalition, if they would not accede to the use of the word "cause." I mean, that seems to me a fundamental starting point.

Ms. VARGYAS. Well, I think it is a distinction here without a difference, if I may. That the burden—there is another point which I would like to make, and then I will certainly let Mr. Fried continue.

Chairman LAFALCE. Within the history of jurisprudence, in order to prove causation, have we not always used the word "cause?"

Ms. VARGYAS. The point is here that as a plaintiff, a party will have to identify a practice or a group of practices and show that results in the disparate impact.

Chairman LAFALCE. We are going around in circles.

Ms. VARGYAS. In addition, there is language----

Chairman LAFALCE. We are going around in circles.

Ms. VARGYAS. There is just one other piece of language which I think to deal with the statistical imbalance, and then to proceed.

There was language which was not, because of procedural reasons on the Senate floor, put into the Senate bill, but it was agreed to, and it is certainly language that we are not opposing.

Chairman LAFALCE. But is it in the House Judiciary Committee bill?

Ms. VARGYAS. Yes, sir; it is, and it flat out says that statistical imbalance alone is not sufficient to make out a prima facie case. I think that any suggestion to the contrary is simply a mischaracterization of this legislation.

Chairman LAFALCE. Well, even Mr. Dunne said that is not true. Even Mr. Dunne said that is not----

Ms. VARGYAS. Excuse me, I did not hear him. What did he say?

Chairman LAFALCE. He said a prima facie case would not be made simply by the showing of a disparate impact.

Ms. VARGYAS. Well, Mr. Fried is suggesting that all you have to do was show a statistical imbalance, and I think that is not correct.

Mr. FRIED. You need the statistical imbalance. Why are we avoiding the word "cause." I think you have put your finger on something, and it has been a fight. It has been a fight all along, and if it

has been a fight, it must be because something is at stake. But beyond that, a practice or group of practices—I am very worried about the group of practices notion. It is very complicated, but it may look as if the plaintiff can simply point at everything or a large number of things that the employer does: Where he has his employment offices, whether the employment office is open at 9 in the morning or at 8 in the morning.

He can have a long and open ended list, and he says that that is the group of practices, and now you pick out the one who is causing this imbalance, or, in fact, justify them all. I think that is quite unfair and very burdensome.

It is not just the causation point, which I think is a very important point to the fairness of the employer's burden, but it is also the definition of that burden once he receives it.

The Kennedy-Hawkins bill, as it was engrossed in the Senate, is very complicated on what that burden is. It uses the word "significant," which is drawn, in fact, from the Wards Cove case itself, but it embeds it in about three paragraphs, and one paragraph which is absolutely lethal.

You have got to be a specialist in this area to know how lethal it is. It says that you have to justify this by validation studies, objective studies, and so on,

Chairman LAFALCE. Demonstrable evidence.

Mr. FRIED. Anybody who is in this business knows what that means. What that means is that you have got to go out and hire industrial psychologists to validate your tests, and Justice O'Connor, in the Watson case, said that is a terrible thing to do because small businesses cannot afford to do it, and large businesses do not want to take those risks.

It seems to me that the sensible thing to do, and I will get to my bottom line, because it is a little different from the administration's. It is wonderful not to be in the administration and just be able to say whatever you think is right.

I am not so hung up on the burden of proof point. It does not seem to me unreasonable, and I said this when I testified before the Senate, and Senator Hatch, whose witness I was, practically shot out of his chair when I said, look, I do not think putting the full burden of proof on the employer is so unreasonable.

Chairman LAFALCE. Once the prima facie case had been made.

Mr. FRIED. Yes, sir.

Chairman LAFALCE. And the traditional elements within it.

Mr. FRIED. Right, and once the burden that he must meet is a specific and a reasonable one. Now, my suggestion is this, and I do not want to come in empty handed.

Chairman LAFALCE. This is what I attempted to do in the bill that I introduced on Thursday, which was basically Kassebaum's, that does shift the burden of proof to the respondent, but with what I considered to be a reasonable test.

Mr. FRIED. I think that all of these various things that we have been seeing are so elaborate, sort of epicycles upon epicycles, that it is a bonanza for lawyers. I would suggest that if we are serious that the one thing we want to do is to put the burden of proof on the employer. We do not want to up the ante in terms of what he has got to prove, and we do not want to put in surreptitious quotas.

I would suggest the following language: Leave everything else out about Wards Cove. Do not say another word about it, and have this one simple sentence. "In a disparate impact case, the burden of proving business justification shall be on the defendant." That means that causation is where it was before the Congress got into the act. That means that what "business justification" means is where it was before Congress got into the act, and that the only thing that you are changing is who has that full burden of proof. It is the defendant; it is the employer. The rest of it we will leave to the courts, and we will not create section, after section, after section.

Chairman LAFALCE. I would buy that immediately. But the point is——

Mr. FRIED. I do not know that the administration would.

Chairman LAFALCE. I do not think that the civil rights community would. That is the problem.

Mr. FRIED. It sounds like we have something that is about right.

Chairman LAFALCE. Maybe we should say we legislate. The administration does not legislate, and the special interests on the left and the right do not legislate. We legislate.

Mr. FRIED. Are you sure?

Chairman LAFALCE. Well, unfortunately, that is the difficulty in reaching accords. Because so often you cannot reach an accord with a Member until he or she checks with the special interests.

Mr. FRIED. Mr. Chairman, I would suggest to you that——

Chairman LAFALCE. I will reach my own judgments regardless of the special interests.

Mr. FRIED. This one sentence, this one sentence, will change Wards Cove and make clear that the burden of proof of proving justification is on the employer, and it will leave everything else alone. I think that the myriad of provisions which I have read fussing around with causation, result, causation, groups, not groups of practices, and then all of this very elaborate language is either going to change things for the worst and make the burden that the employer has to meet impossible, or it will take us a generation before we know what it means.

Chairman LAFALCE. This is the first time that I have heard your suggestion. It sounds too good to me to be true to accept right away.

Mr. FRIED. It is so short.

Chairman LAFALCE. But I would also wonder if yours is the type of idea that everybody wants to agree to and, therefore, cannot now until you come to conference and you come to the crunch. If one side agrees to it now, then the other side will say well, we could get better than that. You see, that is always the problem.

Mr. FRIED. Yes, sir.

Chairman LAFALCE. When do you play your trump card.

Mr. FRIED. Well, I only get here once in awhile. I have moved out of Washington, so I decided that I would play my trump card right away.

Chairman LAFALCE. We enjoy this. We will have you back more often.

Ms. Vargyas, you have not studied that particular language, but your gut reaction to it?

Ms. VARGYAS. Thank you.

Chairman LAFALCE. Without having to go back and meet with the board.

Ms. VARGYAS. No; I do not have to meet with the board on anything. I can tell you that we certainly strongly oppose the language, and let me explain why, and later on, I do want an opportunity to talk a little bit more comprehensively about our concerns.

Chairman LAFALCE. Sure.

Ms. VARGYAS. There are three major parts of Wards Cove that are problems. One part is the burden of proof issue to be sure, and it is a very major problem. This certainly, at first blush, appears to address the burden of proof issue.

However, there are two other problems. The second problem is the definition of business necessity, and under the Griggs standard—and it is very interesting that Mr. Fried has not used the language of business necessity.

Mr. FRIED. I leave it blank.

Ms. VARGYAS. Well, no; you do not leave it blank. You say justification, which seems highly evocative of the Wards Cove standard, and in Wards Cove, again, the second major thing that Wards Cove did is that it took a standard which we had understood from Griggs to be embodied in the concept of necessity, that the business really had to do something for important business reasons, and it was clearly articulated somewhat differently in different decisions over the years. But necessity was the cornerstone. In fact, the court said the touchstone is business necessity.

Justification is something quite else, and one of the things that the court in Wards Cove did was to redefine the concept of necessity to say virtually any legitimate business reason would be sufficient. Again, at first blush, I believe that is what the term justification encompasses.

It is our very strongly held view that once a plaintiff has made out a prima facie case of discrimination—granted it is not intentional discrimination but nonetheless there is discrimination on the basis of gender, race, or national origin—once that situation exists, the business, the defendant, has to do better than to say well, it is more convenient; it is easier.

Let me give you an example. There is a long line of cases, gender cases which I certainly am more familiar with, has been the kind of height and weight requirements that you have seen the police and fire departments impose or many years ago they imposed. You have to be 5'8" or 5'9" and 150 pounds for the job. This disqualified 80 to 90 percent of all women.

They had no real reason for these requirements. They were just very sloppy and imprecise proxies for stereotypical notions of strength, and they thought that you had to be big to be a police officer, so that people would pay attention to you. They could come up with other kinds of justifications. They would have to order more uniforms, and that it would be more expensive. That they would have to have the wear and tear on the seats, or having seats to accommodate shorter legs in patrol cars could be expensive.

All of these things are business justifications. They go to costs, and they go to convenience. But they do not go to the bottom line, that height and weight have absolutely nothing to do with ability

to be a police officer. We have seen these requirements fall like a stack of cards under the Griggs' test.

We have seen police departments now open to women in ways that they have never been. Other ethnic groups that tend to be smaller—there was very compelling testimony in the Senate by an Asian man who finally was able to get a job as a police officer and performed beautifully. Police departments could justify these practices, but these practices are not necessary.

Chairman LAFALCE. You have made a good point.

Mr. FRIED. Can I respond to that?

Chairman LAFALCE. We can either do two things or both. We can either have Mr. Fried respond as to how his language would deal with that, or we could address the issue of whether the committee bill or Kennedy-Hawkins responds to it in the way that Griggs and its progeny did, or whether it goes beyond Griggs and its progeny, and I think perhaps we should do both.

Mr. FRIED. I was not trying to do anything nefarious by using "business justification." I used that term because it is a generic term, specifically because it is completely neutral in that whole gamut from necessity to reasonableness, in order to leave the law on that point where it is.

Here is where the law is, and I will read you what Justice White said in Wards Cove. He said, "Though we have phrased the query differently in different cases, it is generally well established—"

Chairman LAFALCE. Which Justice are we quoting?

Mr. FRIED. This is the Court, Justice White for the Court in Wards Cove. "it is well established that at the justification stage of each disparate impact case that the dispositive issue is whether a challenged practice serves in a significant way the legitimate employment goals of the employer. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review will permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be essential or indispensable to the employer's business for it to pass muster. This degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils."

Chairman LAFALCE. Actually, the original bill that was produced used the word "essential."

Mr. FRIED. What I am saying, Mr. Chairman, is that by leaving the issue open, not touching it, we are leaving the law where it was. That is where it was.

Ms. VARGYAS. With all due respect——

Chairman LAFALCE. No, Ms. Vargyas. I understand Professor Fried's point, and I think you pointed out the difficulties with it. I know you have difficulties with it, too. Because I just personally think that it might be too open, and perhaps this is something that should be tied down, and then the question is, how would it be tied down? So, if we did want to not leave it to the future Supreme Court to determine what a business necessity or a business justification is, then what is the appropriate definition to give to business necessity? So, let us get down to that for a second.

Ms. VARGYAS. I would just want to say quickly that it is a little upside down to be using Wards Cove to justify this. I mean the whole point of the legislation is to reverse Wards Cove, and it is based on a very fundamental view that Wards Cove has reversed the preexisting law. So, certainly, I do not think that Wards Cove is the standard that we look at in preexisting law.

Chairman LAFALCE. No; as a matter of fact, we were looking in some instances to the language that was used by Justice Stevens in his dissent in Wards Cove.

Mr. FRIED. Or the Beazer case is one. I would be happy to read to you from Beazer.

Chairman LAFALCE. It is my understanding that the manifest language that has been used in the dissent in Wards Cove and has been used by the progeny of Griggs or as it was used in Griggs, and that the Kennedy-Hawkins bill and the House Judiciary does not use the manifest language but that it uses other language. Could we have a discussion of that issue.

Ms. VARGYAS. I think that is an excellent question. The Judiciary bill which mirrors the Senate bill uses language directly from Griggs.

Chairman LAFALCE. In the formulation of the issue rather than from the holding and, as I understand it, not from the Griggs progeny, not generally used in the Griggs progeny. But the Griggs progeny, I have been advised, has generally used the manifest language.

Mr. POSHARD. Griggs demands a showing of necessity, right?

Mr. FRIED. It uses lots of words. "Necessity" is one word that it uses. It was a Chief Justice Berger opinion, so that may explain some of that. It uses lots of language. "Manifest relation" is language that it uses. I think that the best statement is in the Beazer case by Justice Stevens, and, if I may, I will just read you what that says.

"At best what we want is that it be job related, a legitimate employment goal. Finally, the district court noted that these goals are significantly served even though they do not require. The record thus demonstrates a manifest relationship," and "manifest relationship," and then instances and quotes to Griggs. So, we have got those words in established pre-Wards Cove decisions.

Ms. VARGYAS. There was much discussion, if I may to go back to this, in trying to formulate the standard. Because, again, one of the problems clearly is that the courts have used such a number of different expressions, and the question with the manifest relationship has certainly come up and been a matter of discussion.

In looking at some of these formulations, I think that it is important to remember the facts of Griggs to understand some of the language that was used, and why, in extending into the future, that some of that language is not as helpful as it might have been in the past.

Griggs itself was a case where two employment tests and a high school diploma requirement were used which had a very major disparate impact on the basis of race. In that case——

Chairman LAFALCE. Two employment tests.

Ms. VARGYAS. Two employment tests and a high school diploma requirement. Now once the plaintiff showed that these tests and

these requirements resulted in a very substantial disparate impact on the basis of race, the employer could not come up with anything. I mean there was nothing. These requirements had nothing——

Mr. FRIED. It was a disgrace.

Ms. VARGYAS. Yes; if I may. There was nothing. So that the language in that case, and we are talking about "manifest relationship," was based on a fact situation where there was not a glimmer of a justification for these requirements.

Now, in the last 19 years since Griggs or not quite 20 yet, the situation has radically changed. Even looking at the testing world, employers have cleaned up their act enormously. I mean Griggs has had a major improvement. There are still many problems, but the problems tend to be far more sophisticated and subtle problems now.

Employers at least understand that they have got to have reason and explanation. At this point, I would like to take some exception to Mr. Fried's suggestion that the Judiciary bill requires validation studies. It does not. It lists validation studies.

Chairman LAFALCE. It says that there must be demonstrable evidence.

Ms. VARGYAS. Demonstrable evidence. But in terms of talking about statistical evidence——

Chairman LAFALCE. Both objective criteria and subjective criteria, is that correct?

Ms. VARGYAS. What that means is that you cannot just opine.

Chairman LAFALCE. That means what it cannot do, opine, but what does it mean that you must do? What does it mean that you must do with respect to subjective criteria?

Ms. VARGYAS. I am reading from the bill. As it says, "the defendant may offer as evidence, statistical reports, validation studies, expert testimony, prior successful experience, and other evidence as permitted by the Federal Rules of Evidence, and that the court shall give such weight, if any, to such evidence as is appropriate."

Chairman LAFALCE. Now that is not enough; continue reading.

Ms. VARGYAS. Well, that is the end of the section.

Chairman LAFALCE. Well, no; read the section that says, "but demonstrable evidence must be—"

Ms. VARGYAS. Well, that is the preceding sentence. I am happy to read it.

Chairman LAFALCE. Please do; yes.

Ms. VARGYAS. "In deciding whether the standards in paragraph 1," the preceding paragraph, "for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient. Demonstrable evidence is required."

Chairman LAFALCE. All right, "demonstrable evidence." Now with respect to both objective and subjective criteria, is that correct?

Ms. VARGYAS. Well, it does not say that, but that is implicit; yes.

Chairman LAFALCE. That is the only way that you could read it.

Ms. VARGYAS. Sure.

Chairman LAFALCE. So, what demonstrable evidence would you have to produce with respect to the subjective criteria, which sub-

jective criteria especially in the hiring and the promotion of individuals involved in management decisions might be required?

Ms. VARGYAS. Well, I think, perhaps, the most relevant would be prior successful experience, which is specifically listed. Expert testimony, people or psychologists in the employment field who have studied and know what kinds of criteria that one should look for. I think that a very useful place to look are the Uniform Guidelines on Employee Selection, which go through how all kinds of employment practices can be supported. The point of all of this——

Chairman LAFALCE. Well, this law is going to apply to Congress, right?

Ms. VARGYAS. Yes.

Chairman LAFALCE. So, let me talk about employment practices in my office. I have an opening right now, and I have interviewed about 10 people. I have had a number of people interviewed by the other people who work with me in my office, and I have said to them, what are your thoughts? Is this the type of person that you would like to live with, 8, 10, 12 hours a day? Do you think that it would make for a happier work environment, et cetera? I am letting my employees make this judgment. It is a pretty subjective type of judgment right now. This is a legislative assistant's job.

There was one girl that I was pretty high on, and some others said she writes extremely well, but she is a cold fish. We just do not think that we would be happy with her, that she would not be a plus to the office. So, we are still looking, and it is my employees' judgment. They like that practice. That is how they were hired, by being interviewed by other employees.

How would that type of practice stand up?

Mr. FRIED. It would stand up just fine if you managed to have a racially, ethnically, gender balanced work force, and since you would be worried about it, you would not run the risk; you would simply hire by quota, which is why the President calls this a quota bill.

Ms. VARGYAS. Well, again, your office, as I take it, is a fairly small office. In order to show the significant differences that plaintiffs would have to show to make that a prima facie case, it is rather difficult to do that with a very small universe which we would be talking about in your office.

Chairman LAFALCE. We do not exempt the universe from the bill, do we?

Ms. VARGYAS. No.

Chairman LAFALCE. Should we?

Ms. VARGYAS. Well, no; title VII does not cover employers of under 15 employees. But, furthermore——

Chairman LAFALCE. I have more than 15. Every Member of Congress has 18. Now we have them in different offices. Which is applicable? That is a very legitimate question.

Ms. VARGYAS. I would imagine that you would be covered.

Chairman LAFALCE. I have three district offices, and I have a Washington office. Now I only have 10 in Washington, but I have 2, 2, and 2 in the district with 1 who floats amongst all 3, so, that is 17.

Ms. VARGYAS. We think you are covered. That is the opinion.

Mr. FRIED. I think that you are covered.

Ms. VARGYAS. But I think that there are two points. First of all, when you are looking at a disparate impact case, you have to show significant—not necessarily statistical, and Justice O'Connor, certainly in the Watson case, talks about statistics coming in in all different fashions and so forth—but you have to show a significant differential on the basis of one of the prohibited characteristics.

So, if one woman, for example, does not get a job for whatever reason, and there is no pattern, and it is very hard to show pattern. That was my point, just that it is very hard to show a pattern. There are many cases which the plaintiffs' claims where there are only a very few people involved that are tossed out.

But on the other hand, let me just get to the basis of it. I am sure that this is not true in your office, but if there are people who, for whatever reason, and this did not happen very long ago, who are just uncomfortable with women in a professional capacity, or they are just uncomfortable with blacks in a professional capacity, I think that we should not be able to hide behind some notion of subjective criteria.

Chairman LAFALCE. You are right; you are absolutely right.

Ms. VARGYAS. And say that this is their gut, that it should be all right.

Mr. FRIED. I agree with that.

Chairman LAFALCE. You are absolutely right. The question is how do we get there without opening the door to 99 abuses in order to get to that one problem. That is what I am concerned about. Let me ask another question though, because this is the plight of Congress.

Suppose, for example, that my district is 50 percent Italian, and Mr. Poshard's is 50 percent Polish, and we are reelected with 51 percent, so we have a tough race, and I need a district representative.

Am I violating the law if I look for an Italian American, or is he violating the law if he looks for a Polish American, because we have to get reelected every 2 years, and we just feel that having somebody of that background is going to be extremely helpful in making outreaches into this large constituency for which we are politically reliable?

Ms. VARGYAS. I think that you could very possibly make that argument. The situation came up in Senate discussion of could you even——

Chairman LAFALCE. I could make the argument, but would I be violating the law? That is the question.

Ms. VARGYAS. I think that there is a very good argument that you are justified by business necessity within the meaning here. I think that you certainly could.

Chairman LAFALCE. I think you are stretching. I would be afraid that my opponent could make a very interesting argument, too, that I was discriminating.

Ms. VARGYAS. There are too many other facts that we would need to know as to exactly how this would work.

Mr. FRIED. I think that you are in trouble.

Ms. VARGYAS. I do not think so.

Chairman LAFALCE. I think that we are passing a law, and I think that these are the practical day-to-day situations that we

better think about now. I mean if somebody has got a large Jewish constituency in New York City, and they want a Jewish district representative.

Mr. FRIED. But let me tell you that I think you are in trouble. But I think in that respect that if the record showed that what you were looking for was a Pole or a Jew that you ought to be in trouble incidentally, just to make the record clear.

Ms. VARGYAS. I think that it depends on what the other concerns are.

Chairman LAFALCE. But would President Bush be in trouble if he looked for a woman for the Supreme Court, or would President Bush be in trouble if he looked for a black to replace Justice Blackmun should he retire?

Mr. FRIED. No; because the Constitution, I think, gives him a rather wide scope to nominate whoever he wants, and the Senate can deal with that problem if it chooses. But you, sir, would be in trouble, and I am afraid that if you were looking for a Jew or an Italian and you came out and said that, you would be in trouble and you should be in trouble.

Chairman LAFALCE. If you said it.

Mr. FRIED. Well, there you are.

Chairman LAFALCE. What about if I were looking for a woman because I wanted to make an outreach into the women's community?

Mr. FRIED. I think that if you were looking for somebody who would be sensitive to women's issues that you are more likely to end up with a woman to fill that bill. But there are some women who are insensitive, and some men who are very sensitive to those, and I think that my notion of civil rights is one where you do not say only women understand women's issues, and I think probably you would agree with me.

Ms. VARGYAS. Absolutely.

Mr. FRIED. There we are.

Chairman LAFALCE. But I hear the argument so often about men, that they just should not be deciding or talking about certain issues.

Ms. VARGYAS. I would come back and say that the disparate impact analysis at best will have an extraordinarily limited applicability to an office such as yours because of the numbers, and I think, in a way, that it is looking down the wrong route. I mean issues can come out.

Chairman LAFALCE. I was not just thinking of my office, but I was just thinking of all of our offices.

Mr. FRIED. Well, the Watson case and the Fort Worth Bank was a small bank with a very small number of employees, and they were operating on a kind of a seat of the pants basis. They said, quite candidly, if we have to hire experts, and psychologists, and all kinds of people like that to prove that is how we do our promoting, forget it. We will just hire by quota and spare ourselves the trouble. We cannot bear those risks.

Chairman LAFALCE. Well, I can think of one Member of Congress who very frequently charges racial discrimination any time that anybody wants to do something that differs with his position. I wanted to clean up the 8(a) law which was a cesspool with tremen-

dous scandals, and I had to fight people on the left and on the right.

You never know who is going to bring an action against you. So, the law must be fair.

Mr. FRIED. And knowable.

Chairman LAFALCE. And knowable, and we must prevent discrimination, but we must not pass a law that allows an individual to abuse our efforts to prevent discrimination. That is what we are trying to come up with. Let us go back.

What is the matter, Ms. Vargyas, with using the language of Griggs of "business necessity manifestly related" to the employment in question?

Ms. VARGYAS. Well, we were in this discussion earlier, and let me try to recapitulate and go beyond that.

Chairman LAFALCE. As opposed to.

Ms. VARGYAS. Well, the problem is that there are no magic words out there.

Chairman LAFALCE. I know that there are no magic words.

Ms. VARGYAS. If there were magic words that the Court had used in 1971, and everyone else had used until Wards Cove, obviously they would have been in this legislation, but there are not. The words that have been used have been used in response to the specific fact patterns, and, as we were discussing earlier about the manifest relationship language, it was used in a fact pattern where there was not even a whisper of a suggestion that there was any legitimacy to the practice.

So, the words "manifest relationship" were used. Quite frankly, I am not exactly sure what "manifest" means. It may mean demonstrable, and it may mean "self-evident." If it means "self-evident," I mean it was self-evident in that case because there was absolutely nothing. But that is not a fair standard, and it is not an appropriate standard.

The language that has been taken into the Judiciary bill and the Senate bill, in my view, mirrors the language of Griggs and is the fairest description of Griggs that I have seen.

Chairman LAFALCE. That there is a significant relationship to successful performance of the job.

Ms. VARGYAS. For selection practices.

Chairman LAFALCE. OK. But suppose now I have to hire somebody, and I have to hire somebody not just for the job of receptionist but because it is my practice that I like to promote from within, and I really want to hire somebody who, 6 months from now, is going to be able to fulfill the legislative assistant's opening that is going to come about in my office when somebody takes a fellowship.

Now the qualifications that I need for the job of receptionist are not the qualifications that I need for this legislative assistant, but I want somebody who can grow in the job.

Would that be prohibited under the words "must bear a significant relationship to successful performance of the job"?

Mr. FRIED. I think that you are running a risk. A reasonable sympathetic reading of the language that Ms. Vargyas is proposing might include what you are saying, but it might not. If I were the employer, I would say boy, am I going to run that risk, no, sir. Now

you could improve the language and make it even longer. But I think that every time that you make it longer that you create more stuff for the lawyers. That is why I gave you that one sentence.

Chairman LAFALCE. When I hire a legislative assistant, can that person be a legislative director; and when I hire a legislative director, could that person be an administrative assistant?

Ms. VARGYAS. This is an important question, and this comes up.

Chairman LAFALCE. Yes.

Ms. VARGYAS. I would just like to clarify that it is not language that I am proposing, but it is language that the Senate has approved and language the Judiciary Committee here has approved. It has a bit of a track record behind it.

This is a problem, and it is a problem that we see. Where employers use that justification to deny jobs to people who are qualified for the job that they are hiring for, and then 1 in 10 or 1 in 20 ends up getting promoted.

Chairman LAFALCE. Just a second, let me interrupt. It is different if you are talking about a manufacturing plant where you are talking about an assembly line, and you are talking about some other type of office, too. It seems to me that we might want to have different standards for different types of jobs.

Am I all wet there or do you agree?

Ms. VARGYAS. But you see, the protections that you are concerned about are built into the disparate impact standard. Because it is the concept of a pattern that it would be very difficult for someone unless—again, obviously it is simply hypothetical—but unless you have a practice of hiring receptionists who only are qualified for legislative assistant jobs, and you have never promoted one, and you have never hired a woman, or a black, or what have you for that job over many years, absent that kind of a pattern, the numbers almost surely are not sufficiently significant to allow anybody to make out the case.

Small offices can be drawn from one employment decision every 3 or 4 years involving one or two people. These are enormously difficult cases to make out disparate impact cases, and I do not think you have a realistic concern because of the nature of the analysis.

Chairman LAFALCE. So much of the difficulties we have are with disparate impact cases where we are inferring discrimination as opposed to having demonstrable evidence of intent. Should we have a different body of law for disparate impact cases than we do for—should we have different legislative standards for disparate impact as opposed to legislative standards for something other than disparate impact?

Mr. FRIED. We already do.

Ms. VARGYAS. We do. That is the point.

Mr. FRIED. Mr. Chairman, may I just make one observation? It is a premise of some of this discussion that Ward's Cove was some kind of radical and dreadful thing, a catastrophe that happened and which shows that the courts, and the Supreme Court particularly, must never be trusted again to perform their usual functions of elaborating in a reasonable way what Congress comes up with. I think that is a wholly inappropriate judgment on Ward's Cove.

There is one aspect of Ward's Cove which is troublesome: The burden of proof. It is easily fixed, but I suggest that if the reaction

of the Congress is, "We cannot trust the courts anymore and, therefore, we have got to button it down, and we have got to write something that looks like the Internal Revenue Code in order to keep them from running off the rails again," you will both not accomplish that and you will create a bonanza for lawyers. We will never know what it all means.

I am suggesting that it is perfectly satisfactory to zero in on the one thing that bothers people the most, and which I think is reasonable, and to leave the courts with the rest because you have got to trust the courts anyway. They are your partners.

Chairman LAFALCE. All right, Mr. Fried, with all due respect, nobody wants an IRS code of specificity or anything approaching that. To be sure, we must trust the courts, but we want to give them legislative guidelines strong enough to insure that it is congressional intent that they are effectuating.

I do agree with one of your statements, though, that we ought not to assume that every aspect of every Supreme Court decision is wholly inaccurate, inappropriate, and wrong and, therefore, must be reversed. We must look at the Supreme Court decisions in question to see what it is about them that we want to reverse.

Further, once we make that determination, we must not use that as an excuse to have our druthers and get in not only reversals, but advances above and beyond the Supreme Court decisions prior to the ones that we would change, snuck in surreptitiously, if you will.

Let us go on. Let us discuss a few other issues. Let us discuss the issue of what cases should be tried before the jury and what cases should be tried before a nonjury, and what the particular Senate bill and House Judiciary Committee bill would do in this respect.

Ms. VARGYAS. If I may, that is an issue which has been a particular concern of ours and of the women's community, although, certainly, as well, of the civil rights community as a whole. If I may suggest, the jury trial question is more the tail than the dog. The real question is what remedies are appropriate, and then the jury trial issue follows, really, as a matter of constitutional law. It is our very strongly held view——

Chairman LAFALCE. Would you forgive me if I suggested that whether it should go to a jury or whether it should not is fairly important?

Ms. VARGYAS. Oh, it is absolutely important, although I think that there has been—the discussion on jury trials has been in some ways quite curious because opponents of our position—maybe if I just lay it out a little bit, first, then we can get to the jury trial in a somewhat more useful fashion.

It is our view that because of the historical anomaly in the law, there are available compensatory and punitive damages under section 1981 for discrimination on the basis of race in employment.

Chairman LAFALCE. Now, that is a very recent interpretation of a very old law.

Ms. VARGYAS. It is 15 years old now.

Mr. FRIED. 1981 never applied to gender because 1981 is a reconstruction period statute.

Ms. VARGYAS. Right, but, again, after the Supreme Court's decision in Runyon, which made it clear that damages——

Chairman LAFALCE. What year was that?

Ms. VARGYAS. About 1975, 1976.

Chairman LAFALCE. All right. About 15 years.

Ms. VARGYAS. Plaintiffs in race cases have been able to claim and, in some cases, get compensatory and punitive damages. The concept of race is sort of a 19th century concept of race, so it is somewhat broader than what we normally think of it today, and it encompasses some national origin groups, some religious groups, but most it does not.

Chairman LAFALCE. What does the Runyon Case say?

Ms. VARGYAS. In subsequent cases, the Supreme Court, and I am sure Mr. Fried can probably help me out on this. A couple of years ago there were these sort of book-end cases where the Court held that an Arab in one case and a Jew in another case could claim——

Mr. FRIED. I was in all of those cases.

Ms. VARGYAS. That is what I figured. He can certainly help me on that. Held that the concept of race in 1981, again, going back to this sort of 19th century concept of when 1981 was drafted, is broader than what we think of today, and so, it does certainly provide for claims that people, victims of discrimination, because they are Jewish, but probably not Catholics, and where Greek Orthodox fall, I could not tell you.

Mr. FRIED. And certainly not women.

Ms. VARGYAS. And certainly not women.

Title VII, when it was set up, before the Runyon Case, and I certainly do not think this was done with any animus or particular purpose, set up a system of equitable remedy which does not include damages, either punitive or compensatory. I know the history is a complicated one, but that was how that came out.

So, we are faced now, since 1976, with a situation where a victim of race discrimination in employment can claim and, on occasion, get compensatory and punitive damages, but a victim of gender discrimination and many kinds of national origin and religious discrimination cannot get that relief.

It is our view that there is no——

Mr. FRIED. They can get back pay.

Ms. VARGYAS. Back pay restitution—I am sorry. Reinstatement, the equitable model under title VII.

Chairman LAFALCE. Traditional employment violation remedies.

Mr. FRIED. The kind of thing you would get under the Labor Act.

Ms. VARGYAS. That is right, but there is an ongoing debate. It is certainly our position that title VII is a discrimination law, not a labor law in that sense, and, under most of the discrimination laws, you do get damages.

Chairman LAFALCE. Title VII was title VII of what?

Ms. VARGYAS. The Civil Rights Act of 1964. Certainly, under the Fair Housing Act, Congress, in 1988, eliminated any limits on damages and the other post-Civil War statutes, sections 1982, 83, 85, you can get damages. So, our view, a strongly held view, is that the appropriate analogy is not this labor analogy which some have suggested, but the discrimination analogy.

Be that as it may, we have a very practical situation. A woman who is discriminated against on the job, who is harassed—and

there was testimony in both the House and Senate of, I would not even repeat here the disgusting and awful nature of the discrimination which these women suffered—could get nothing.

So, language has been included in the legislation. It is limited to cases of intentional discrimination. We have nothing here—we are completely off the disparate impact discrimination. A plaintiff has to show that he or she was the victim of intentional discrimination on the basis of gender, race, religion, or national origin.

Chairman LAFALCE. How does the Senate bill and the House Judiciary Committee bill—do they explicitly exclude disparate impact cases?

Ms. VARGYAS. Yes; they do.

Mr. FRIED. Yes; that is another story.

Ms. VARGYAS. They do, and there is actually new language. They always did, and there is new language now.

Chairman LAFALCE. From both punitive and compensatory?

Ms. VARGYAS. Yes, sir; there is no way that anybody could possibly argue otherwise.

Mr. FRIED. That is absolutely correct.

Chairman LAFALCE. So, we differ from the Bush administration in this respect.

Ms. VARGYAS. Well, if they are saying that, they are just wrong, I have to say.

Mr. FRIED. No, no. I do not think the Bush administration interprets it this way, do they?

Ms. VARGYAS. I do not know. I had not heard that. I know there has been a suggestion out that you can get damages in disparate impact cases, and it is just flat wrong.

Chairman LAFALCE. I think there is a suggestion that you could get it in egregious disparate impact cases.

Ms. VARGYAS. No, sir.

Mr. FRIED. It is the recklessness, the recklessness language maybe is somewhat troublesome.

How does that work? What do you think?

Ms. VARGYAS. Well, no; that is clearly just intent and, again, I am just looking here. There was language which was added. It was originally done by reference excluding cases by reference to disparate impact section and then new language was put in the Senate which was incorporated in the Judiciary bill, which says once again, compensatory and punitive damages in jury trials shall be available only for claims of intentional discrimination. There is just no way around that.

Chairman LAFALCE. Yes; but what is intentional? Can intentional discrimination be inferred from circumstances?

Ms. VARGYAS. Oh, no; absolutely not. You have to prove intent to get it.

Mr. FRIED. It is an inference of intent.

Chairman LAFALCE. Yes. When can there be an inference of intent?

Mr. FRIED. That is an old story we are probably in agreement on.

Ms. VARGYAS. I do not think that has been a controversial question. I think that the question has been raised that somehow you can sort of sneak in and bootstrap up damages into a disparate

impact claim, and I think, as a legal matter, that is simply impossible.

So, I think that the real question before us is, and I framed it this way before, and I think it is the way we should look at it: Who should bear the cost of intentional discrimination? We have proven it. We are not dealing with how we prove it.

Chairman LAFALCE. OK.

Ms. VARGYAS. Is it the perpetrator of that discrimination or is it the victim of that discrimination. Under current law, if you are a woman, or if you are a Catholic, or if you are an Italian, and you have been discriminated against on one of those bases, tough luck, you pay. If you had medical bills, if you lost your house because you lost your job, if you had any other consequential nonwage injuries, too bad, you pay; your employer gets off.

Chairman LAFALCE. OK. But you have mentioned something. You mentioned medical bills, and I forgot the other one you mentioned. It was specific.

Mr. FRIED. Lost your house.

Chairman LAFALCE. Lost your house. What about pain and suffering?

Ms. VARGYAS. Emotional distress is how it is called in here and has been included in the formulation.

Chairman LAFALCE. Can we get rid of emotional distress? I mean if we talk about something that is specific, Ms. Vargyas, we could tie it down. But if we permit emotional distress, that is pain and suffering. I mean that is a lawyer's delight, and that is also the horror of the employer community. I am looking for a moderate middle ground. I want to compensate, and my answer is clearly, the perpetrator of the discrimination is the one who has to pay. But pay for what?

Mr. FRIED. Mr. Chairman, a suggestion on that, a concrete suggestion. If that is your concern—it is a sensible one—one could go in the same direction as one has gone in a number of automobile situations where you can get consequential damages, and Ms. Vargyas mentioned a number of those which seemed very reasonable, of a monetary sort. Monetary consequences. Hospital bills, fine. Lost your house, fine. Pain and suffering, humiliation, and so on, too open-ended. The showboat plaintiff's lawyer can make too much out of that, and, in the automobile area, we have excluded that.

Chairman LAFALCE. Except, perhaps, for harassment as opposed to—perhaps you could permit something like that for harassment or retaliation.

Mr. FRIED. Yes; you have got a point. That is right. It is reasonable.

Ms. VARGYAS. In looking at this, we are not looking at a blank slate. We have 15 years of experience under section 1981 and the damages provision in this legislation is specifically modeled on section 1981. We have an analysis——

Chairman LAFALCE. 1981 was passed in the 1800's without any thought that it was going to be applied the way it is being applied. So, to look upon that as a model is not something that I think is the best approach to take.

Ms. VARGYAS. But I am actually, although I disagree with you, I am making another point here which is that we know the experience of damages awards under 1981. We know how this legal standard has been applied in race cases.

Chairman LAFALCE. With a certain type of burden of proof, with a certain type of——

Ms. VARGYAS. That is exactly how it would be in this legislation.

Chairman LAFALCE. I am not sure about that.

Let me go back to my point. We constantly want to make our points, but since I am chairman, I will make sure that it is my point.

Ms. VARGYAS. You need to make your point?

Chairman LAFALCE. Not make my point, but focus in on my point.

Ms. VARGYAS. Sure.

Chairman LAFALCE. Suppose we exclude compensatory damage. By compensatory, I am distinguishing between compensatory and consequential.

Mr. FRIED. Nonmonetary. How about nonmonetary?

Chairman LAFALCE. We are talking about money so I am even hesitant to use the words. What I am talking about is excluding pain and suffering. Excluding punitive damages, but permitting consequential damages, except maybe if you are talking about harassment, and then you have got to have some reasonable limit. I think $100,000 might be a reasonable limit. Is there room for compromise with the civil rights community along those lines, or is this something that you would want to go back and discuss without giving me a firm—you can give me a firm yes, if you want; do not give me a firm no.

Ms. VARGYAS. Well, I think I have to give you a pretty firm no.

Chairman LAFALCE. Pretty firm is not firm. Thank you.

Ms. VARGYAS. It is our view that there is no reason to treat victims of certain kinds of discrimination differently from victims of other kinds of discrimination. Perhaps, the point is best made when you read some of the decisions where black women file.

Unfortunately, because black women are among the most vulnerable members of our society, this is not an infrequent situation, and they are in court where their remedies depend entirely on the question of whether they were discriminated on the basis of their gender or their race. You might as well be trying to count how many angels can dance on the head of pin. You know perfectly well that it was because of both, but they have to convince a judge or a jury that it was because of their race that they were discriminated against in order for them to get any decent kind of recompense, and I think that is just an unprincipled and untenable position to have in the law.

Chairman LAFALCE. Ms. Vargyas, in life and in law, we are often dealing with competing truths, and I will not deny the truth of what you said. Nor should you deny the truth of those concerned about what would happen if a law such as the one you are espousing were to be applicable to them, with an attorney's bar, with some justified or unjustified individuals who believe they have been aggrieved.

As a Congressman, I get letters from my constituents everyday. There are scores of them telling me about their so-called grievances. Ninety-nine percent of the time, or I should not say 99 percent, very frequently, they are not aggrieved at all. But if they were permitted to bring a law suit claiming pain and suffering, wow. You would just send nightmares through every employer in America. It would just produce an untenable situation. We must find a compromise. We must find some reconciliation of these valid, but competing interests.

Ms. VARGYAS. Well, if I could just again pursue something I was trying to say earlier: These employers are already liable under section 1981, and everybody, I mean absent the problem of the Patterson Case which seems everybody is on board should be reversed. Certainly, the administration. So, these employers are liable for race discrimination, and we know the kinds of awards which have been ordered. We have a complete review of all court-ordered section 1981 decisions from 1980 to the very beginning of 1990, and we know in those years there were only three awards nationwide which exceeded $200,000. One of those, I believe, is still on appeal.

In many ways—let me be quite frank—I understand the concern about damages, but in many ways this issue, the response to this issue is a response to all kinds of other issues about damages which people are concerned about which have very little to do with the facts which are before us. We know those facts.

Chairman LAFALCE. The chairman of the Small Business Committee in the Senate, Senator Bumpers, I believe, said before the House, it is not what the average award was, it is what the award could be.

Ms. VARGYAS. But it has never been.

Chairman LAFALCE. But if an individual employer believes that individual is going to bring an action against him and could get before a jury a 100,000, a 200,000, a $1,000,000 award, that just sends chills up and down his back. It seems to me there ought to be some reasonable limit. It seems to me the unlimited nature of the damage gives sustenance to the President's argument that although the bill may not be a de jure quota bill, it is one that might lead to that result. Result in—maybe not cause, but result in.

Mr. FRIED. Mr. Chairman.

Chairman LAFALCE. Yes, Mr. Fried.

Mr. FRIED. Just a word on this. One of the things we are looking at which is strange about this is we have a set of provisions, some of which address Supreme Court decisions in the 1988 term which the civil rights community did not like, but others, such as what we are talking about here, have nothing to do with any Supreme Court decision. They are quite fresh.

Now, what is odd about this——

Chairman LAFALCE. The bill was originally sold as an effort——

Mr. FRIED. That is right. To restore. But, in fact, it is a lot of other things as well.

Chairman LAFALCE. Yes. Very frequently, I find myself opposing legislation more because I detest the way it has been marketed than I do the bill itself. That was true in part with the family leave bill. I favored family leave. I cosponsored the family leave bill, and

then it was marketed with such intellectual dishonesty. I was supremely offended by that. I was also offended by the overreach, too.

Mr. FRIED. But to address the point that Ms. Vargyas is making, she is making some very good points and points which I find that one cannot disagree with. The reason that it is odd to have that in this bill, which is supposed to be a restoration bill, is that those matters are appropriately addressed, and they are problems, in a bill which would constitute a fundamental reworking and rationalization of our civil rights laws as such.

If you wanted to do that, then a lot of things would be on the table, including the matters Ms. Vargyas talks about. In that context, a lot of things would be different. You might change punitive damages in the race area. You might cap them. You might do a lot of other things. But we have this odd ratchet, and you used that word, I think, situation where this is a bill which is going to change anything the Supreme Court did in the 1988 term, and it is going to change other things, too, which the Supreme Court did not do in the 1988 term so long as it is more favorable to plaintiffs. Those are the principles of the legislation.

Now, I do not think that is a sensible principle of legislation. If the Congress wanted to have a comprehensive review——

Chairman LAFALCE. It is not sensible for legislators. It is sensible for interest groups, though.

Mr. FRIED. Yes.

Chairman LAFALCE. The point is, who are we dealing with? Legislators or interest groups?

Mr. FRIED. Well, you are not an interest group and neither am I.

Ms. VARGYAS. I would suggest, with all respect, that the coalition which I speak on behalf of, which encompasses well over half the population of this country, is not an interest group either.

Chairman LAFALCE. Congress encompasses 100 percent. By definition, we are supposed to represent the public interest. That does not always work out that way.

Let us go to some other issues. The Wilks Case.

Mr. FRIED. I have not said much about that because I think that what Kennedy-Hawkins does is so extreme that I am not worried about it. Parts of it are plainly just unconstitutional, and that is what is going to happen.

A provision which says that a person who has not been represented in court is going to be bound by a decree where the court made an effort to inform him, but presumably did not succeed, is so plainly in violation of the notion of due process that it will not survive. Therefore, I have not wasted any breath attacking it. It is an example, I am afraid of the extreme overreaction that this bill represents.

You saw what the Supreme Court did in 1988, and whatever they said has got to be reversed in every respect. It is unreasonable. The Martin *v.* Wilks provisions are unreasonable, and I think some of them are so unreasonable that they cannot survive even constitutional inquiries, so I have not addressed them, but I would be happy to do so.

Chairman LAFALCE. Ms. Vargyas, would you care to comment on, if not the constitutionality of the provisions, the wisdom and desirability or necessity of those provisions?

Ms. VARGYAS. Let me comment briefly on both, and I would just say that this is probably the area of the bill that I am least familiar with. If you have questions that I cannot answer, I am sure we would be happy to very quickly, given the timeframe, provide you with fuller information. Of course, it is our very strong view that it is constitutional. Written in, at many points, in that particular section is a requirement that it must comport with due process, so I think that goes without saying.

The policy reasons are very powerful. What you have here and what the Supreme Court set up in Martin *v.* Wilks is a situation where there never can be finality, where consent decrees will never be final, which are virtually subject to endless attack and endless litigation, which means that these very difficult questions and these very raw wounds will never heal. I think very telling was the support for this provision which was so overwhelming, from mayors, from governors, from the representatives of the governmental entities which are so often implicated in these cases who want to settle suits, who know in the Birmingham case, for example, where there had been a long history where no black had ever been hired as a fire fighter, where something was very wrong and something had to be done to deal with that very disgraceful history, where cities wanted to reach an accommodation with plaintiffs and want to move forward.

Under Martin *v.* Wilks, we will not see cases settled. There is no reason to settle a case because it is endlessly open.

Chairman LAFALCE. Now, what did that case hold? Who could help me? We went into this with Mr. Dunne, but let us continue.

Mr. FRIED. Martin *v.* Wilks held that civil rights cases are subject to the Federal Rules of Civil Procedure like every other case. The Federal Rules of Civil Procedure say that a party is not under an obligation to intervene in a lawsuit which might affect his interest. It is up to those people who are in the law suit to bring them in. He can sit on the sidelines and then litigate his rights as he finds convenient. That is the Federal Rules of Civil Procedure.

What Martin *v.* Wilks said is the Federal Rules of Civil Procedure apply to civil rights cases, too. That is all that it said, and that provision is a very sensible provision. It says that nobody's interest can be foreclosed unless that person is represented and has their day in court. I think that is so fundamental that I do not see what the dispute can be. Now, it is inconvenient, but due process can be inconvenient. I do not think that is a sufficient answer.

Chairman LAFALCE. Yes; there is a desire for finality. Everyone desires that, but there is the desire to ensure that every individual gets due process also.

Mr. FRIED. I will give you an illustration of how this works. You have a consent decree regarding promotion of persons, and it is a promotion standard which, let us say, bears in a very unfair way on nonminority males. OK?

I am a person who is in high school at the time this consent decree, which is going to run for 5 years, comes out. I do not know whether I am going to be a fireman or a lawyer. So, I do not intervene in that lawsuit. I graduate from high school 2 years later. I join the fire department, and I find that my chances of promotion

are severely impacted by that consent decree. Under this provision, I am out of luck. I cannot complain. That seems to me very unfair.

Ms. VARGYAS. I would just point out that all 11 circuits had rules limiting collateral attacks prior to this. This was not some kind of a hair-brained scheme in terms of having rules of finality. In other areas of law, these are very well established. For example, in bankruptcy proceedings, you either say your piece, you make your claim, or you are foreclosed. These are very well-established legal principals, and it is our view that the provision in Martin *v.* Wilks, the provision, rather, in the legislation which addresses Martin *v.* Wilks which does not go as far as a number of the Federal Circuits went prior to Martin *v.* Wilks, appropriately balances the very important competing interests of finality and the interests of litigants. But what it says is that you make your claim at the proper time because the social interest in finality, especially in these terribly difficult discrimination cases, is sufficiently important that we have to balance. We have to have a rule of finality.

Chairman LAFALCE. If you have the capacity to make your claim at the appropriate time, that is one thing, Ms. Vargyas, but suppose that you even lack the capacity. Suppose you are the high school student. As I read that language of the bill, it did not seem to me that it addressed even that.

Ms. VARGYAS. You are not automatically barred. You are barred if—and I am trying, please forgive me. I want to see what it says here. If you had actual notice that it could affect you and then the opportunity was available to present objections to such order, and it was a reasonable opportunity to present objections, if the court determines that the interest of such person were not adequately represented.

So, if you have the high school student, first you have to make sure that there was an opportunity to be heard and, second, if nobody raised the claims that that person would have made if he or she had known about it or had been in a position to make it, that person can still make their claim.

But if that person is only repeating claims which were already made before the court, then they are barred. This is not a Draconian step. I can assure you that within the discussions going into it, this is a very compromised position. This does not automatically bar potential claimants. There is always the person who lived in Alaska. The person who was not born yet.

This is a very good faith, and I think successful effort to really balance legitimately competing concerns, and I think it does it, and, clearly, the Senate thought that it does it. Two House committees have been satisfied that it does it.

Chairman LAFALCE. What about the issue of mixed motives? Can we have a discussion of that, please? Also, before I forget, after that I want to talk about attorneys' fee settlements.

Mr. FRIED. On the mixed motives, that is a funny one because——

Chairman LAFALCE. All of these are funny.

Mr. FRIED. As was the case on a number of these things, in the racial harassment cases, as the Solicitor General, I put in a provision which the Supreme Court knocked down. They disagreed with me. I was more pro-civil rights than they. On mixed motives we

proposed, the Justice Department proposed that in a mixed motive case, if the bad motive is a substantial factor, then there ought to be liability, and Justice Brennan had a different view. That is the view which this legislation seeks to reverse.

Now, I think the way we proposed it, when I was Solicitor General, is the right way. If the bad motive is a substantial factor, then you ought to be able to come in and get some damages. Unfortunately, the language just says if it is a factor there at all, and I am afraid that is dangerous.

Chairman LAFALCE. Well, I have come in with what I think is a compromise, or attempted to. I have come in and said just a factor is not enough even if there were other factors that would have precluded you.

Mr. FRIED. Yes.

Chairman LAFALCE. A substantial factor, though, is too much. Senator Kassebaum put in a bill, and I sort of concurred with her moderate position, and I introduced it, too, that if it was a major contributing factor as opposed to substantial.

Mr. FRIED. That is fine. Anything like that.

Chairman LAFALCE. Even though other factors contributed to such practice. Ms. Vargyas.

Ms. VARGYAS. No; not at all.

Chairman LAFALCE. All right. Tell me why.

Ms. VARGYAS. The notion here—and I think that the Kassebaum approach and I would say we have not been really talking about the Kassebaum bill—but it is our view that in virtually every provision, it is a major gutting substitute.

Certainly, the Civil Rights Coalition strongly opposes every piece of it. We believe that it codifies Ward's Cove and the preexisting law rather than making any of the changes, and we think it is a wholly inappropriate vehicle.

Chairman LAFALCE. I know that it would be marketed as a gutting, although I do not think it is a gutting at all.

Ms. VARGYAS. Well, we can go back to some of that language, but——

Chairman LAFALCE. It is a question of where you are, too. It is a major advance from where we are.

Ms. VARGYAS. No, sir; it is not. It codifies where we are. That is the problem with it, and in Price Waterhouse situation——

Chairman LAFALCE. Intellectual honesty could make that statement, but go ahead.

Ms. VARGYAS. Well, I would be happy to go through it line by line with you, because I would be happy to show it to you, but let me start with Price Waterhouse. "Major contributing factor" actually is a step backward from Justice Brennan's opinion in Price Waterhouse. "Major" means it has to be very significant. It means it has to be very substantial.

Chairman LAFALCE. Well, what did Justice Brennan say?

Ms. VARGYAS. What was his exact language?

Mr. FRIED. What Justice Brennan said was that if it was a factor, then the defendant can come in and say, "Yes; but I would have fired this person or failed to hire them anyway." If the employer can prove that, then there is no liability at all. That is Justice Brennan. So, I think this is a clear advance.

Chairman LAFALCE. If you want a Justice Brennan.

Ms. VARGYAS. No; we do not.

Chairman LAFALCE. Neither do I. You had just said——

Ms. VARGYAS. It is our view that what this issue is about is whether a little bit of discrimination is OK. It is our view that no discrimination is OK, and that where there are mixed motives and in virtually every case you see, the employer will advance a nondiscriminatory reason for the action. So, for almost every case in a fashion, certainly every case of potential discrimination is a mixed-motive case. It is our view that the only principled view can be that no discrimination can be tolerated.

The example is given: An employer wants to hire somebody for a position for which a Ph.D. is required. The employer also puts up a sign on the door and says, "No women need apply. I will not hire women." A woman applies who does not have a Ph.D. She is not qualified. This employer, however, is discriminating in a very self-evident and very troubling way.

The balance of the provision in the legislation strikes, which I think is appropriate, the balance in the remedy to say that no one will get anything that they would not have properly been entitled to, but that you can get injunctive relief, and if you can prove and the damages are limited. I mean it specifically says damages which resulted from the illegal action, so, you cannot say in that case, "Well, I lost my house because I did not have any money because I did not get the job." You did not get the job because you were not qualified. But if you can show damage that, at the very least, enjoins that employer from carrying on that blatantly discriminatory action.

Mr. FRIED. I have to say I agree with part of that.

Ms. VARGYAS. This provision addressed in the remedy, and it says we will not tolerate discrimination and with all due respect to Justice Brennan and the many, many extraordinary contributions he made, I think he was wrong on this one.

Mr. FRIED. Let me just say where I agree with Ms. Vargyas and where I do not. I agree with the injunctive relief, and it is quite traditional. You see this in the labor area. If you have an employer who has an antiunion practice, and he fires somebody, and the employer can prove that he would have fired that person anyway, the Labor Board will nonetheless force the employer to post notices and will enjoin him from continuing that practice. That is as it should be, and I would agree with you that the employer who has that sign on the board or—I see this in law schools. You sometimes get law firms that come around recruiting, and they send out a recruiter who uses racist or sexist remarks. Now, if they do that, I think they ought to be enjoined from doing that. I think that is fine, and I agree with you there.

I am afraid that the proponents of this bill will not leave well enough alone, and the well enough alone that they will not leave is they then want to insist that you be able to get some kind of damages, too, and that is unreasonable.

Sure, enjoin that practice. But if the job applicant, my student, is offended, is insulted, is upset by the racist remarks, I do not think that she ought to have a lawsuit for that upset or that offense. She ought to have a lawsuit to stop the employer from doing that. That,

I think, is the difference, and it is not a very great difference between us. The important thing is enjoining the practice so it does not go on in the future.

Ms. VARGYAS. But with the Kassebaum provision, we do not get an injunction because you lose. You do not have a cause of action. If that law firm says, "Well, I would not have hired her anyway. She was at the bottom of the class. She was terrible," and that was persuasive, you do not have a claim so you do not get any relief.

Mr. FRIED. We agree on that.

Ms. VARGYAS. But Kassebaum would preclude the relief.

Mr. FRIED. So, we agree on that.

Chairman LAFALCE. So, it should be changed at least to provide injunctive relief.

Mr. FRIED. As the labor laws do.

Ms. VARGYAS. But it is already clear that you can only get—now, for example, if you have a mixed motive case where you have a particularly blatant form of racial or sexual discrimination with someone behaving in a truly outrageous fashion, which unfortunately happens, I think it is very important that you should get a remedy.

Mr. FRIED. Besides the injunction?

Ms. VARGYAS. Besides the injunction. Because that employer takes the message: "Well, I can be truly outrageous. I can make the most despicable comments. I can show women pornographic pictures and nothing happens."

Chairman LAFALCE. You make a very persuasive argument. You make a very persuasive argument. My question is how to do it appropriately?

Ms. VARGYAS. I think we have done it. I think that the Senate-passed bill and the two committee bills do it.

Chairman LAFALCE. That is the problem, Ms. Vargyas, you are giving the egregious example that we should deal with, but with language that would not only deal with the egregious example but would deal with an example that is not egregious in the slightest.

Mr. FRIED. But I think that if you have got an injunction against that employer, he does not get away with it because he knows if he does it again, he is in contempt, and he goes to the slammer.

Chairman LAFALCE. Yes; but we are not just worried about the second time. We are worried about the first time, too.

Mr. FRIED. Contempt?

Chairman LAFALCE. Yes; contempt is pretty serious for the second time around. We are worried about the first time.

Ms. VARGYAS. Not easily proven. I mean it is very hard to get that kind of relief out of the court.

Chairman LAFALCE. I do not know. The second time around gets it to you. But we are worried about the first time around. If we had more time than—Wednesday, we are going to have some time. I have got a lot of problems with the committee bill. I have got a lot of problems with the Bush administration. I have some problems with Kassebaum to be sure, but we are operating under the gun, and we should not be. We were told this would not come up until September. Who is ramrodding this through now? They are the ones that are causing us to—they are forcing our hand. I hate

having my hand forced, because then you have everybody taking bad positions.

It seems to me that people of good will ought to be able to come up with language to deal with that situation.

All right. Let us talk about attorneys' fees.

Mr. FRIED. I have nothing to say on that one.

Chairman LAFALCE. Well, I understand that you cannot enter into a settlement if the subject of attorneys' fees have been a part of the settlement negotiations.

Ms. VARGYAS. No, no, sir.

Chairman LAFALCE. That you could not enter into a settlement agreement where the respondent requires as a condition of the settlement that the plaintiff pick up his own attorney's fees. Is that true or not true?

Ms. VARGYAS. Well, it is not quite true.

Mr. FRIED. Pretty much.

Ms. VARGYAS. The provision you are talking about is the provision which deals with the Supreme Court's decision in Evans *v.* Jeff D., which said that consistent—and that was under section 1988 which is the Civil Rights Attorney's Fees Awards Act, but title VII and section 1988 have been construed similarly.

In that case, they said that you could compel waiver of all fees as a condition of settlement, and that was a case where there was a very successful challenge to the conditions at a facility for, I think, disturbed juveniles. The settlement terms were about everything that the plaintiffs had asked for. The State defendant said, "We will give this to you. We will give you everything you asked for on the condition that you waive all fees."

Now, civil rights cases—and the Supreme Court said that was consistent with section 1988. The problem is that section 1988, the fees provisions in title VII, other fee shifting provisions, are there to enable private parties to bring cases, and the only way they can bring cases is if they can get attorneys to bring the cases. The only way attorneys are going to bring the cases is if they get some money for bringing the cases because they cannot afford to do it otherwise. The problem in Jeff D. is that it allows the defendant to totally manipulate the process, to draw these cases out forever and where you have a plaintiff with no resources, in that case, a class of incompetent juveniles who could not pay a penny for their representation. Just have the defendant come in and say, "You will get everything you want, but no fees."

Well, that is fine in that case for those plaintiffs. That attorney is never going to bring another case, and there is a very, very major problem in civil rights litigation in the drying up of the plaintiff's bar.

There was a very interesting article in the Post business section a couple of weeks ago about an attorney who was a sole practitioner, a plaintiff's attorney, went out of business, just flat out of business over 10 or 15 years ago. Just finished paying off over $100,000 in debts that he had incurred in representing clients in where he never got any compensation.

What this provision says is that the parties or their counsel have to attest that a waiver of all, or substantially all, attorney fees was not compelled as a condition of the settlement. It still allows for

the negotiation of fees. That is routinely done. I am in another matter, as we speak, negotiating fees with defendant. I mean this is a potential contempt matter, but there are some limitations on how far you get with contempt as a practical matter. But this is a very modest provision. It simply says you cannot compel. A defendant cannot come in and say, "The only way I will settle this case is you waive all or substantially all of your fees." It is a modest provision. In my opinion, it does not go as far as it needs to go, but it does go somewhere.

Chairman LAFALCE. Well, Ms. Vargyas, what I am afraid of is that you have a situation where a plaintiff attorney might say, "Well, I will take this case because in any settlement, we will be able to get the defendant to pick up the cost," and that will become the rule. We will never have a settlement unless the plaintiff's attorney picks up the cost—unless the respondent picks up the cost of plaintiff's attorney.

Ms. VARGYAS. Under current law, certainly under title VII, under section 1988, Congress has said that it is public policy where you have a prevailing plaintiff for them to get reasonable attorney's fees. What this does, it keeps that in place, and it simply says that a defendant cannot——

Chairman LAFALCE. But in a settlement you have no prevailing party.

Ms. VARGYAS. Well, yes; you do, and the Supreme Court has held in Maher *v.* Gagne that you can get fees and be a prevailing party for purposes of a settlement.

Chairman LAFALCE. Who determines that?

Ms. VARGYAS. The court would. The court that is hearing the case. You would submit the settlement to the court. Normally, the court would approve the settlement. In any event, you take it to the court and the court would determine whether, in fact, the plaintiff is a prevailing party. This has been established for about 12 years, now. I guess a 1978 or 1979 case. You do not necessarily. The court will decide who is prevailing, and there is a fairly substantial body of law which has arisen in defining that.

Mr. FRIED. There is a question. I do not want to jump up and down about this, but there is a question that I have asked and that is to what extent does a provision like this create an incentive for defendants not to settle a case because they are going to say, "Look, we do not think we did anything wrong. We are perfectly ready to settle. We are perfectly ready, for instance, to put in some provisions in this mental hospital or whatever it is, but we do not want to pay $500,000 in attorney's fees, and if that is what we have got to do, we will just as soon take our chances in litigation." Then there is no settlement. So, you have got incentives both ways, and I think you have to recognize that.

What is troubling about so much of this is it is as if there are not two sides to this question, and there are.

Chairman LAFALCE. There are always two sides.

Ms. VARGYAS. Except again, we have experience with that before Jeff D. Before Jeff D., the general rule was that you would settle fees and merits separately. It was based on a Third Circuit decision, and you would first settle the merits of the case and then proceed to the fees, and the fact of the matter is that it was not a

practical problem because everybody wants to settle a case if you can. It is in everybody's interest to settle a case if you can do it on decent terms.

So, I do not think there was any showing. There certainly has been no showing made that we saw a problem in reaching settlement before Jeff D.

Chairman LAFALCE. But very frequently, in settlement decisions, in settlements, do you not make provision within the settlement decree regarding attorney's fees.

Ms. VARGYAS. This does not alter that.

Mr. FRIED. In most situations; yes.

Ms. VARGYAS. This does not alter that in any fashion. It just says you cannot be compelled to waive your fees as a condition of settlement. I imagine that the great majority of settlement decisions in fee shifting cases will include provision for fees and will continue to.

Mr. FRIED. But then why does it help you so much because we do not waive the fee? We limit it to $5,000 and then you are around that provision and have you accomplished anything very much?

Ms. VARGYAS. But you cannot waive all or substantially all. So, if you are looking at 10 years of litigation and hundreds of thousands of dollars of fees, $5,000 does not do much to reimburse that attorney and make it possible for him or her to continue a civil rights——

Mr. FRIED. So, you have got a big lawsuit then on whether it is substantial, and that is a problem.

Chairman LAFALCE. I suppose we could go on endlessly on this but that is all that I have time for right now, regrettably.

I want to thank you very much, Professor Fried. You originally were going to come in on Wednesday. Is that correct?

Mr. FRIED. I forget.

Chairman LAFALCE. I regret that they then scheduled to go for Wednesday.

Ms. Vargyas, I really thank you very much, because I would have hated it if Professor Fried would have had to have been here by himself, because there are always at least two sides to every issue.

Ms. VARGYAS. That is very gracious of you.

Chairman LAFALCE. Believe me, we tried to get Bill Coleman and Eleanor Holmes Norton who agreed to come in. We tried to get Larry Tribe, Vernon Jordan, and others, but none could have done a better job than you, Ms. Vargyas, and we are very, very grateful for that.

It is still my hope that this bill will not be up on Wednesday, because I do not think that the community of Congress at large has had any time at all to consider this bill. Perhaps the members of the Judiciary Committee have, but they would probably be the only ones in the House. I still do not know if there is a committee report out available to Members to read. Maybe it is; maybe not.

To bring a bill up right now is to try to take advantage of the situation and on behalf of the small business community, I am only chairman of the Small Business Committee, this bill is going to impact employers of 15 or more.

We have an interest in this. Now I have a strong, strong civil rights record. But I also said that we are not going to have anybody ride roughshod over the small business community, and I do not know what does or does not at this point in time. We need more time, and I hope that we are not going to be forced to offer a substitute that, while imperfect, seems less imperfect to me than the committee bill at this point in time.

I will not argue against its imperfections, and I am going to try to improve those imperfections between now and the time I have to offer it this week, if I have to offer it this week. But to me, the imperfections of the committee bill which give primary consideration to one perspective and almost no consideration from another perspective are not adequately balanced. We need something to adequately balance.

Also, I am not interested in forcing an issue for an election. I am interested in passing a law. The President right now has the votes to sustain a veto. He proved that in the Senate. I understand that there are about 20 Democrats who would have preferred not to have voted for it who would have preferred to have voted for some compromise.

You can glean this from the language that some of the Senators used in their arguments on the bill on the floor of the House. We should not be put in such an untenable position, and, if anything comes out of today's hearing, I hope it is a delay in consideration of the bill so that more individuals can become involved in this process. I think we have had too few individuals involved, primarily individuals belonging to two camps, neither of which are amenable to compromise. I think it is time for those individuals who belong to neither camp, who are interested in compromise, to start fashioning their approaches.

I look forward to working with both sides in an effort to do this, because I am sure each side can point out the difficulties which the other side would never point out.

Thank you very much.

[Whereupon, at 12:35 p.m., the subcommittee adjourned, subject to the call of the Chair.]

APPENDIX

Hearing before the Committee on Small Business

Opening remarks of

the Honorable Silvio O. Conte

July 30, 1990

Thank you, Mr. Chairman. A little over a year ago the Supreme Court handed down five (5) decisions that constituted a real setback to persons seeking relief from discrimination in the workplace. As a response to the Supreme Court's narrow interpretation of the 1964 Civil Rights Act new Civil Rights legislation, H.R. 4000, was introduced; a bill of which I am proud to be a co-sponsor.

H.R. 4000 and the bills that followed it have created a great deal of consternation in the Small Business Community. Small business owners all over the country fear that this legislation will mandate racially based hiring quotas and subject small business owners to lawsuits where they will be forced to prove their innocence, a reversal of our common law tradition.

Recently, our Chairman Mr. LaFalce, introduced H.R. 5385 a bill designed to address those fears. I want to thank you Mr. Chairman, for calling this hearing so that we may talk to the representatives of the Department of Justice and Professor Charles Fried, former Solicitor General of the United States. I am sure that they will help us put the fears of the Small Business Community to rest and enable us to move forward with our new Civil Rights legislation.

OPENING STATEMENT
OF THE
HONORABLE JOHN J. LaFALCE, CHAIRMAN
COMMITTEE ON SMALL BUSINESS

HEARING ON
CIVIL RIGHTS ISSUES AFFECTING SMALL BUSINESS

The hearing will come to order.

This morning the Small Business Committee will be considering an issue of great importance, not only to the business community but to all the American people. The issue concerns the legal standards which should be used in adjudicating cases of employment discrimination by race, color, creed, sex or religion. As you know the Supreme Court, in its last term, issued at least six controversial civil rights decisions, decisions which many believe jeopardized the structure of civil rights employment law as we have known it over the last 20 years.

Both the Administration and the Congress have been struggling ever since that time to clarify the principles which should govern the law of employment discrimination. The Senate has now passed a bill which addresses these issues. Several House Committees have also considered these issues. At the end of last week I introduced a bill, (H.R. 5385) which I believe, strikes a good balance between the rights of employers and those of employees and which, in essence, restores the law to what it was prior to the recent Supreme Court decisions.

The Members of the Committee on Small Business however, have

not yet had the opportunity to hear these issues addressed.

Here to testify this morning are:

Mr. John Dunne, Assistant Attorney General for Civil Rights, Department of Justice; Mr. Charles Fried, Professor, Harvard University School of Law and Ms. Eleanor Holmes Norton, Professor, Georgetown University School of Law.

I am particularly interested in the testimony on two key areas of controversy, the standards to be used in disparate impact cases, and punitive and compensatory damages.

I am interested in a detailed discussion of the legal differences between the Administration's views and the views contained in the bill passed by the Senate and reported by the House Judiciary Committee. For example, on the disparate impact questions there are many aspects that can be addressed:

- objective vs. subjective hiring criteria,
- which "Griggs" standard if any should be used,
- how should business necessity be defined,
- which party should bear the burden of proof,
- whether and to what extent singular or multifold hiring criteria need bear a causative relationship to the disparate impact etc..

Before we commence do other Members have opening remarks?

STATEMENT OF THE HONORABLE JOSEPH M. McDADE
FULL COMMITTEE HEARING REGARDING
CIVIL RIGHTS AND SMALL BUSINESSES
JULY 30, 1990

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Mr. Chairman, I want to commend you for convening this hearing today on a topic of great importance to all citizens of the United States.

I am a strong supporter of equal and civil rights for all Americans. The protection of these fundamental rights is vital to the survival of this nation and the ability of each of our citizens to make a living and provide for their families. As small firms continue to grow and become more critical to the economic health of this country, we need to ensure that they are not adversely affected by well-intentioned and greatly needed legislative remedies to unfair racial biases. The hiring and employment practices of most small firms are not governed by the discriminatory intentions of their owners but by the limits of the job market. As the unemployment rate continues to hover at a low figure, small firms, which tend to be the first job for many young people, are forced to hire those individuals who are available. And, unfortunately, in many cases the demographics of an area plays a key role in determining the makeup of employees. Thus, the failure to achieve an equitable racial balance in many of our smallest firms is unintentional but also unavoidable. In such cases, we need to ensure that an understanding rather than accusatory eye is cast.

With these thoughts and concerns in mind, I look forward to hearing the testimony of today's witnesses.

TESTIMONY OF CHARLES FRIED ON KENNEDY-HAWKINS BILL

House Small Business Committee - July 30, 1990[1]

There are several aspects of the Kennedy-Hawkins Bill that are sound and necessary; several that are possibly useful or of debatable value; and some that are in my view a serious threat to the proper balance of civil rights laws and to the proper autonomy of private businesses and institutions in this country. It is not surprising that the Bill should have this mixed-bag quality, given what appears to have been the theory that motivated its drafting. In the 1988 Term the Supreme Court handed down a number of decisions on a wide variety of issues touching upon civil rights and anti-discrimination laws. There was no single theme to these decisions, and they were decided by shifting majorities -- one decision sought to be revised here was authored by Justice Brennan. The Bill, however, does appear to have a theme: [redacted] Every decision which might be seen as somehow unfavorable to the litigating pos-

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1. Charles Fried is Carter Professor of General Jurisprudence at Harvard Law Scool, and was Solicitor General of the United States, 1985-1989.

ture of a civil rights plaintiff is sought to be overturned. The result is a very miscellaneous set of provisions. It is no wonder, then, that among the sound and proper proposals would also be included some very unfair and harmful provisions.

Today I want to speak to only one of those, although I would of course be glad to answer questions about any of the other provisions, some of which I warmly favor -- and indeed argued for as Solicitor General. I want to focus on the provisions dealing with disparate impact Title VII suits, the so-called Wards Cove provisions. It is these provisions of the Bill that I think are most harmful to the proper, I would say the traditional and mainstream conception of civil rights in this country.

That mainstream position -- the one the great number of Americans of good will subscribe to -- was announced by Senator Hubert Humphrey, the most authentic Congressional voice on civil rights in the last half of this century, during the debates on the original 1964 Civil Rights Act. Senator Humphrey made it clear that the employment provisions of the Act were directed to eradicating discrimination from employment in America. He also made it clear, again and again, that the Act was not intended to compel private

employers to hire minority workers simply to achieve what is called balance -- that is, racial proportionality -- in their workforce. He set his face against any such option for two reasons: first, because it is profoundly wrong to make individual employment choices on the basis of race, either for or against a person; it is profoundly alien to our individualistic and if I may use the "l" word liberal traditions. The second reason he opposed racial or gender balance, quota-hiring, was his deep respect for the private enterprise system, his sense that the private institutions of this country, the businesses, the hospitals, universities and labor unions, should be free to make what employment decisions seem best to them, so long as they do so without the awful moral stain of discrimination.

In my view the Wards Cove provisions of Kennedy-Hawkins, in subtle and obscure language which is so technical that only experts can parse it and discern its impact, are inconsistent with Hubert Humphrey's great vision of civil rights laws. That great vision would prohibit discrimination, but does not compel hiring by race and leaves private institutions as free as possible to run their own affairs without interference by lawyers, judges and bureaucrats.

The great fault of Kennedy-Hawkins is to put employers in a situation that they run litigation risks so menacing that it becomes by far the most rational thing to do, to hire by the numbers, to seek a racially balanced workforce. If they do not hire by the numbers, Kennedy-Hawkins confronts them with a burden of justification that is so onerous that few sensible employers will risk trying to meet it -- no matter how fair and unbiased their practices. The way Kennedy-Hawkins gets to this result is through the notion of disparate impact, a notion first announced in the Griggs case.

I do not quarrel with the idea of disparate impact or the Griggs case, if they are properly understood. The central idea behind that decision was that employers sometimes erect barriers to minority employment even without harboring a wicked discriminatory intent. They might do so by heedlessness or indolence -- although the Griggs case itself displayed employer conduct that was a good bit more questionable even than that. In the Griggs case the employer, who had run a rigidly and viciously segregated workplace, shortly before the Civil Rights Act was to go into effect instituted for the first time a high school dip-

loma requirement as a condition for certain more desirable jobs from which it had up to then blatantly excluded blacks. This the Court would not allow. But there are less reprehensible practices too at which Griggs was directed. For instance certain labor unions limited membership to relatives of current members. Though such a rule was not directed against non-white workers, its effect was to raise an absolute bar in cases where there had been no non-whites in the union before. And other practices might work as barriers to minority job applicants but have no role in the running of the business. They are there by inadvertence, heedlessness, habit. All of these would form the basis of a successful Griggs law suit. This is as it should be. The Wards Cove decision did not change this. Hubert Humphrey's great principles are still intact.

But we go far beyond that vision if the very fact of a racially unbalanced work force subjects an employer to potentially crushing liability. Now, of course, Kennedy-Hawkins does not come right out and say that. Rather, it presses employers in that direction by placing on them excessively onerous, expensive, uncertain burdens of justification, whenever a civil rights plaintiff establishes

a prima facie case based on statistics showing an unbalanced work force.

I do not wish to oversimplify or to be unfair to the proponents of Kennedy-Hawkins. Once you move in the Griggs direction -- that is, away from intentional discrimination or even pretexts for discrimination -- in the direction of removing what the Court has called arbitrary barriers to employment opportunities, you are necessarily going to get into some kind of evaluation of practices or requirements that seems to operate disproportionately on minorities or women. Once you move in this direction, you will need some explanation from the employer beyond his good faith and lack of discriminatory intent to justify what he is doing. So I readily agree that how you do this is a matter of balance and judgment. I would like to persuade you that even in its present form Kennedy-Hawkins is not balanced, is not fair, that it allows far too much intrusion into good faith private decisonmaking by decent and properly motivated pirvate employers. I do not say that the proponents of Kennedy-Hawkins intend by indirection and artifice to compel quota-hiring. I comepletly credit their good faith in this regard. But I am just as sure that in their excessive zeal they have seized one horn of a dilemma, that they are willing to

countenance undue pressure towards quota hiring, that they have lost sight of the other side of the equation which Senator Humphrey was at such pains to emphasize.

To be precise, the correct balance is struck when first, a civil rights plaintiff has shown -- with as much specificity as the situation allows, and that may vary from case to case -- that a particular job requirement or employment practice produces bad numbers, has a disparate impact. That is the prima facie case. It is then up to the employer to assume some burden of justification. Personally I would have thought the balance is struck in just about the right place if the burden of going forward is placed on the employer -- that is, he has to come up with some sensible explanation for the questioned proactive, but the ultimate burden of proof is on the plaintiff to show that this proferred explanation is pretextual or inadequate. That is what we argued to the Court successfully in Wards Cove. But I have also said from the outset -- and I remember I distressed some of the opponents of this bill when I said this last February before Senator Kennedy's committee -- this is a close question, a question of judgment, and that I could not quarrell with those who think the balance is more fairly struck when the full burden of proof as to business

justification falls on the employer. Among other things, such a scheme has the virtue of simplicity, a virtue which is otherwise sadly lacking in this bill.

But this accommodation on the burden of proof is only fair so long as the burden the employer is made to bear is

first, a quite definite and focussed one, and

second, it is a burden that he can discharge on a fair and reasonable standard. To force the employer to prove the business justification for an open-ended set of practices, and to force him to justify them in excessively demanding terms is unbalanced and unfair.

This is why the plaintiff should have to identify what practice or group of practices he is complaining about, and why the standard of justification, the meaning of business justification that must be established -- whether by the plaintiff or by the defendant -- should be a reasonable one. I feel very strongly that Justice White in Wards Cove got this exactly right: We already know that the employer's practices are neither intended as a means nor a pretext for discrimination. We are in the realm of good faith business practices. And in that realm, the proper question is, is the practice one that in some real and identifiable way contributes to what the employer is legitimately trying to accomplish in his business. Anything more demanding puts a heavy and uncertain burden of justification on the employers in this country to justify themselves to outsiders, out-

siders who do not know these employers' businesses, do not know their legitimate goals, do not know their problems and circumstances.

The first version of Kennedy-Hawkins was quite draconic in this respect. It required the employer to justify his practices as "essential". Since February we have seen a series of changes in that very drastic original language. Unfortunately, I believe we are still too far from a fair and proper adjustment. The Senate Bill now uses the words: "significant relationship to successful performance of the job". The qualifying adjective "significant" also occurs in and may be drawn from what Justice White wrote in Wards Cove:

> Though we have phrased the query differently in different cases, it is generally well-established that at the justification stage of such a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. See, e. g., Watson v. Fort Worth Bank & Trust Co., 487 U. S., at ; New York Transit Authority v. Beazer, 440 U. S., at 587, n. 31; Griggs v. Duke Power Co., 401 U.S., at 432. The touchstone of the inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification . . . will not suffice. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet . . . .

But in the Senate's Bill this term "significant" does not stand alone. It is accompanied by additional requirements[2] and imbedded in a brace of paragraphs (Section 3 (o)(1)(A) and (B)) that are obscure and wordy, but clear in one respect at least: that they are intended to up the ante on the employer's burden of justification. Paragraph (3) does say, after all, that the provision is meant to "overrule Ward's Cove Packing Co." -- and the additional claim that this provision is meant to "codify" Griggs hardly helps since as I have just shown that is just what Justice White said he was doing in Ward's Cove.

But there is another, and far more lethal provision in the Senate's Bill. Section 3(o)(2) states that the defendant must prove business justification by "demonstrable

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2. For instance, the Bill adds that the relationship must be to "successful performance of the job." Does that mean that an employer may not take into account whether an entry-level employee also has the potential to perform well in subsequent, more demanding jobs to which he may be promoted? Does the term "successful" connote a minimum level of ability, or is the employer entitled to choose the candidate who will do the very best work of all those he considers? It might be said that the term will be interpreted in a way that allows this kind of proper latitude -- but no one can be sure of that, least of all an employer facing litigation risks. Or we might enlarge the provision to make these things explicit -- but that would make yet wordier and more intricate an already ponderous provision.

evidence ... statistical reports, validation studies, expert testimony, prior successful experience . . ." This is very technical language and to the layman may seem innocuous -- of course you want people to prove things by "demonstrable evidence" not "anecdotes". But experts know what might escape the ordinary layman -- or even lawyers who do not practice in this field of law: these terms are terms of art for a kind of evidence that is hard to produce, usually requires hiring batteries of industrial psychologists and other experts, is long and expensive to produce. This is a point that Justice O'Connor emphasized and deplored in her opinion in Watson v. Fort Worth Bank. As she pointed out, small businesses cannot afford to undertake this kind of burden, and even large businesses will hesitate a long time before they take on this expense and effort. More than anything else, the provision will create an irresistible pressure on employers to avoid the need for justification by resorting to quota hiring. And coupled with the substantive standard in the Senate's bill, it moves us just about as far as we ever were in the history of Kennedy-Hawkins from a notion that says to an employer: if you can show that an identified practice is a reasonable way of doing business, then the mere fact that it may produce a workforce that is not racially balanced will not brand you as a discriminator.

These provisions in the Senate's Bill will invite plaintiff's lawyers and judges to make intrusive judgments about whether the way an employer -- admittedly free of discriminatory purposes -- runs his business. These provisions potentially makes judges and plaintiffs' lawyers the not so silent partners of every private institution in this country; it puts plaintiffs lawyers and judges on the board of directors, the board of trustees of every private institution to pass judgment on those institutions' goals and methods. The only way to avoid that kind of intrusion will be to avoid the inquiry in the first place -- that is, to hire by the numbers, to engage in quota hiring.

But even if my fears about the actual operation of these provisions are exaggerated, I have little doubt that their very complexity and wordiness will invite a vast amount of litigation and that it will be a long time, if ever, before we settle into a clear interpretation lawyers can confidently advise their clients about. If for no other reason, these provisions should be redrawn because the litigation and uncertainty they threaten are wasteful and burdensome.

I do not wish to be merely negative, so let me close with a concrete proposal -- one that does accommodate the view that Wards Cove tipped the balance too far against

civil rights plaintiffs, but does so in a way that is simple and understandable. I would suggest that instead of all the Wards Cove language anywhere in the Bill there be substituted the following provision:

> In a disparate impact case the burden of proving business justification shall be on the defendant.

This leaves untouched the developping common law on causation, on the standard of justification and on what kind of proof the employer must come up with to make out his justification. It changes the one aspect of Wards Cove that is most likely to be a real departure from general prior understandings, and it leaves alone matters that as the experience of the last six months shows it is very hard to fix definitively in statutory language. After all, Griggs itself was a a product of the common law of the statute and not of some explicit statutory command.

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STATEMENT OF

SUSAN ENGELEITER

ADMINISTRATOR

U.S. SMALL BUSINESS ADMINISTRATION

SUBMITTED TO THE

COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

JULY 30, 1990

Mr. Chairman, I am pleased to take this opportunity to share the views of the U.S. Small Business Administration on H.R. 4000, an important piece of civil rights legislation that will have a significant impact on small businesses.

H.R. 4000 -- "The Civil Rights Act of 1990" -- would amend Title VII of the Civil Rights Act of 1964 to overrule legislatively the effects of a number of cases decided by the Supreme Court and would alter the remedies available under that act. While I support the need to protect the civil rights of all Americans, I am deeply concerned about the impact the bill, in its present form, would have on small businesses. I urge you to examine that impact carefully.

For instance, a key concern involves the remedies available under Title VII. Title VII is the principal law enacted by Congress to address employment discrimination in the private sector. It prohibits discrimination on the basis of race, sex, color, religion or national origin. Title VII sets forth a carefully balanced remedial scheme designed to promote voluntary compliance efforts and conciliation to resolve disputes. Available remedies for discrimination include reinstatement, back pay, injunctive orders and the payment of attorney fees and costs. These are known as "make whole" remedies. Victims of discrimination are awarded pay and benefits lost as a result of any unlawful conduct. Make-whole relief encourages conciliation and settlement of disputes, rather than encouraging protracted and costly litigation.

I am concerned about proposed changes to the remedies available under Title VII. H.R. 4000 would supplement existing remedies in cases of intentional discrimination and would permit jury trials, compensatory damages and punitive damages. Compensatory damages include money for pain and suffering, emotional distress and other claims. Punitive damages because they are meant to penalize and deter malicious discrimination, are often regarded as a windfall going beyond that which makes a plaintiff whole.

Because they go beyond the presently available "make whole" remedies and create hope for big jury awards, compensatory and

punitive damages encourage plaintiffs to pursue litigation without conciliation. This may be the case even when the plaintiff's case lacks strong evidence of intentional discrimination. Thus, small businesses will be faced with costly litigation, even when that litigation eventually absolves such business of intentional discrimination.

Title VII has worked well for 26 years; there is no need to discard it.

In its present form, H.R. 4000 will discourage the type of settlement that has been the basis of the law for more than 25 years. This issue is serious for small businesses, which have less ability to defend themselves from the legal actions, including specious claims, that the bill would inspire.

Furthermore, the bill will coerce employers into adopting surreptitious quotas. Such quotas are not only unfair to employees, they also prevent employers from hiring or promoting those who are best qualified. At a time when it is essential that American businessmen and businesswomen be competitive in a global economy, such inefficiency is inexcusable.

Due to these provisions, H.R. 4000 will enrich attorneys at the expense of small businessmen and businesswomen. Once again, the ability of American businessmen and businesswomen to compete

should not be hampered by funnelling money from productive activities into litigation and attorney fees.

I urge you to carefully consider whether these outcomes are desirable in a sector that provides two-thirds of the new jobs being created for all Americans.

Thank you.

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